

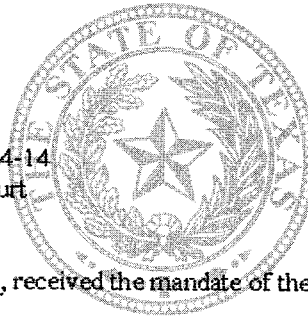
9/10/2003

AP-74,145

MURPHY, JEDIDIAH ISAAC

COA No. Tr. Ct. No. F00-02424-14

Dallas County, 194th District Court



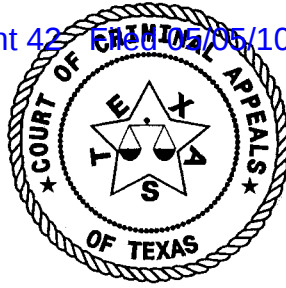
I have this day, **SEP 16 2003**, received the mandate of the Court of Criminal Appeals in the above numbered and styled case.

RETURN CARD IMMEDIATELY.


Signature

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711

ATTN: VERONICA ARELLANO



TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

M A N D A T E

THE STATE OF TEXAS,

TO THE 194th JUDICIAL DISTRICT COURT OF DALLAS COUNTY — GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on the 25th day of JUNE, A.D. 2003, the cause upon appeal to revise or reverse your Judgment between:

JEDIDIAH ISAAC MURPHY

VS.

THE STATE OF TEXAS

CCRA NO. 74,145

TRIAL COURT NO. F00-02424-M

was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

Appellant's Motion for Rehearing is **DENIED**.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE SHARON KELLER,

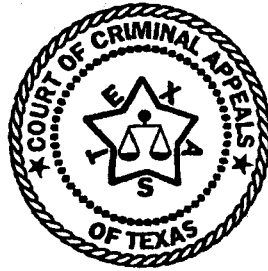
Presiding Judge of our said **COURT OF CRIMINAL APPEALS**,

with the Seal thereof annexed, at the City of Austin,

this 10th day of SEPTEMBER, A.D. 2003.

TROY C. BENNETT, JR., Clerk

COPY
Veronica Arellano, Deputy Clerk
Veronica Arellano



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. 74,145

JEDIDIAH ISSAC MURPHY, Appellant

v.

THE STATE OF TEXAS

**ON DIRECT APPEAL
FROM DALLAS COUNTY**

**Johnson, J., filed a concurring opinion in which Womack and Cochran,
J.J., joined.**

OPINION

I join the opinion of the Court except as to points of error seven and eight and concur in the judgment of the Court as to those points.

In a capital murder trial in which the state seeks the death penalty, Texas law requires jurors to determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . ." Only if all jurors believe that the defendant will continue to be a danger can the trial court assess the death penalty. TEX. CODE .

CRIM. PROC., art. 37.071, §§ 2(b)(1) and 2(d)(2). Thus, it is imperative that jurors understand the difference between “probable” and possible.”

While it is possible that I will win the lottery, it is not probable; indeed, it is highly improbable. There are several reports of people who receive mailings from Publishers Clearinghouse that say that they “may already be a winner” and, confusing possibility and probability, begin to spend as if they have won millions. For them, the inability to distinguish between “probable” and “possible” has a financial cost.

If a juror confuses “probable” and “possible” and also believes that there is a small chance that the defendant might commit violent acts in the future, even if that juror also believes that another violent act is unlikely, that juror may feel compelled to find that the defendant is a future danger. If that juror is also the twelfth vote, the cost of that confusion is the defendant’s life.

In *Hughes v. State*, 878 S.W.2d 142, 148 (Tex. Crim. App. 1992), this Court stated that a prospective juror who cannot distinguish between probable and possible is properly challengeable for cause and that the trial court abused its discretion in denying such a challenge. Too, the legislature was very specific when it promulgated the procedures for assessing the death penalty, and this Court is bound by those procedures. The legislature required “probability,” and so must this Court.

In this case, two jurors appear from the record to be unable to distinguish “probability” and “possibility.” Brooks stated that the probability is “a chance,” while Williams “continued to reiterate that she believed probability and possibility mean the same thing.” *Murphy v. State*, slip op. at 10, *supra*. Under *Hughes*, both Brooks and Williams were properly challengeable, and the trial court abused its discretion in denying appellant’s challenges to them.

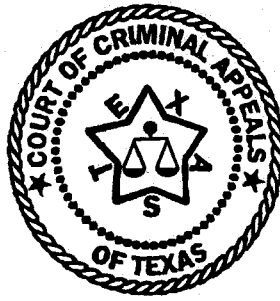
The next issue is harm. Although I would find an abuse of discretion as to both Brooks and Williams, neither served on the jury, and appellant has not complained that he has suffered harm by the need to expend peremptory challenges. He has therefore failed to establish harm, and I would find that the error in denying his challenges for cause was harmless.

Johnson, J.

Filed: June 25, 2003

En banc

Publish



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. 74,145

JEDIDIAH ISSAC MURPHY, Appellant

v.

THE STATE OF TEXAS

**ON DIRECT APPEAL
FROM DALLAS COUNTY**

Holcomb, J., delivered the opinion of the Court, in which Meyers, Price, Keasler, and Hervey, JJ., joined. Keller, P.J., concurred in the result with respect to Point of Error Number Three and otherwise joined the opinion of the Court. Johnson, J., filed an opinion, in which Womack and Cochran, JJ., joined, that concurred in the result with respect to Points of Error Numbers Seven and Eight and otherwise joined the opinion of the Court.

OPINION

Appellant was convicted in June 2001 of capital murder. TEX. PENAL CODE ANN. §19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial judge sentenced appellant to

Murphy--2

death. Art. 37.071 §2(g).¹ Direct appeal to this Court is automatic. Art. 37.071 §2(h). Appellant raises twenty points of error. We affirm.

In his first point of error, appellant claims the trial court violated his rights under the Sixth Amendment to the United States Constitution by limiting his voir dire questioning pertaining to the State's burden of proving beyond a reasonable doubt that appellant posed a future danger. In a pretrial hearing, appellant sought permission from the trial court to ask prospective jurors the following two questions:

Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?

Do you promise the Court that you would not do so?

The State objected on the ground that the questions sought commitments from the jurors. The court sustained the State's objection. Appellant argues that his questions simply inquired whether prospective jurors would hold the State to its burden of proof notwithstanding the presence of evidence of the victim's character.

A trial court has broad discretion over voir dire, including the propriety of particular questions. *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). A trial court's discretion is abused only when a proper question about a proper area of inquiry is prohibited.

Id.

¹ Unless otherwise indicated, all references to articles refer to those in the Texas Code of Criminal Procedure.

Murphy--3

The trial court did not abuse its discretion in disallowing the questions. Appellant did not state how “victim character testimony” would be defined nor did he state whether or not venirepersons would be informed of this area of law before being asked such questions. *Cf. Chambers v. State*, 903 S.W.2d 21, 29 (Tex. Crim. App. 1995)(stating venireperson not shown biased or prejudiced against the law unless the law is first explained to them). A proper explanation of the law is essential before asking a question upon which a challenge for cause due to bias against the law might be based. *See id.* Prospective jurors would need to be informed that the standard of proof by which the State must prove its case remains constant; it may not be increased or reduced depending upon the presentation of a certain type of evidence. In addition, because the standard of proof by which the State must prove its case is not affected by the presentation of any certain type of evidence, the trial court could reasonably have concluded that the questions would be confusing or misleading. Point of error one is overruled.

In his second point of error, appellant asserts the same argument he made in point of error one under Article I, Section 10 of the Texas Constitution. However, because appellant does not argue that the Texas Constitution provides, or should provide, greater or different protection than its federal counterpart, appellant’s point of error is inadequately briefed. *See Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991). Point of error two is overruled.

In his third and fourth points of error, appellant claims the trial court abused its discretion by granting the State’s challenge for cause against venireperson Alena Treat, in

Murphy--4

violation of Article 35.16 and the Fourteenth Amendment to the United States Constitution. The trial court granted the State's challenge for cause against Treat on the ground that she would require proof of another murder or attempted murder before finding appellant would commit criminal acts of violence that would pose a continuing threat to society. Appellant relies on the reasoning in *Garrett v. State*, 851 S.W.2d 853, 859 (Tex. Crim. App. 1996), and cites *Witherspoon v. Illinois*, 391 U.S. 510 (1969), to argue that Treat's views about the death penalty would not have prevented or substantially impaired her ability to follow the court's instructions or the law and her juror's oath.

During voir dire, Treat stated that her understanding of the phrase "criminal acts of violence" meant "the same type of crime" as the capital murder that the defendant would have been convicted of in the guilt phase. Treat maintained that the State would have to prove that the defendant would commit or attempt to commit another murder in order to prove future dangerousness. When questioned by the trial court, Treat stated that intentionally causing a person to become mentally disabled by giving them a drug that would put them into a coma would also rise to the level of a criminal act of violence but conceded later that even these circumstances essentially amounted to an attempted murder.

In *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 941 (1993), the venireperson was challenged for cause on the ground that she would consider imposing capital punishment for serial murderers only. We said that "[b]ecause our law does not categorically reserve capital punishment only for those who have murdered

Murphy--5

before, neither may individual jurors in a capital murder case.” We accordingly held that under these circumstances, the trial court did not abuse its discretion in granting the State’s challenge for cause. *Id.* at 201.

In *Garrett*, 851 S.W.2d at 859, the trial court granted the State’s challenge for cause against a venireperson who testified that he could never answer the future dangerousness issue affirmatively based solely on the facts of the capital offense. The venireperson was struck for harboring a bias or prejudice against the law upon which the State was entitled to rely. We reversed, explaining that each juror must decide for himself what amount of proof would constitute the threshold of beyond a reasonable doubt:

[T]hat the law permits jurors to find future dangerousness in some cases on the facts of the offense alone does not mean that *all* jurors must do so, or even consider doing so. A particular juror’s understanding of proof beyond a reasonable doubt may lead him to require more than the legal threshold of sufficient evidence to answer the second special issue affirmatively. There is nothing unlawful about that; in fact, quite the opposite. As the trial judge himself explained to Bradley early in his voir dire, *an individual juror must determine what proof beyond a reasonable doubt means to him, for the law does not tell him[.]* . . . That an individual venireman would set his threshold higher than the minimum required to sustain a jury verdict does not indicate he has a bias or prejudice against the law.

Id. (emphasis added and footnotes and citations omitted).

In *Rachal v. State*, 917 S.W.2d 799, 811 (Tex. Crim. App.)(plurality opinion), *cert. denied*, 519 U.S. 1043 (1996), two venirepersons were challenged for cause by the State. Venireperson Terrell testified that even if she believed beyond a reasonable doubt that the State had proved future dangerousness, she would not answer the issue affirmatively unless

Murphy--6

the State also presented evidence that the defendant had a prior felony conviction. *Id.* Venireperson Adams testified that even if convinced beyond a reasonable doubt that the defendant would be a future danger, he would nevertheless require evidence that the defendant would kill another human being before he would answer the issue affirmatively. The defendant conceded that under *Fuller*, the venirepersons were properly challenged, but argued that *Fuller* had been overturned by *Garrett*. A plurality of the Court disagreed, holding that *Fuller* controlled and *Garrett* was distinguishable. *Id.* at 811.

A year later, a majority of the Court in *Howard v. State*, 941 S.W.2d 102, 129 (Tex. Crim. App. 1996)(op. on reh'g), *cert. denied*, 535 U.S. 1065 (2002), reaffirmed the reasoning in *Garrett*, holding that:²

A venireman who requires evidence of a prior murder has not demonstrated an inability to abide by the law if his requirement is predicated upon his personal threshold of reasonable doubt. The State must show more, *viz.*: that the venireman's insistence on evidence of a prior murder will prevent him from honestly answering the special issue *regardless* of whether he was otherwise convinced beyond a reasonable doubt of future dangerousness, before it can be said it has met its burden to demonstrate the venireman cannot follow the law.

Id. Thus, under *Howard*, it is plain that prospective jurors may form their own definitions

² In so holding, the Court in *Howard* noted the existence of other circumstances that justified the challenges against the venirepersons at issue in *Fuller* and *Rachal*. *Howard*, 941 S.W.2d at 128 (referring to venireperson's tendency to "pay heed to his own conception of what the law ought to be rather than follow the legal criteria" as justifying challenges for cause). *Howard*, 941 S.W.2d at 128. In addition, the venireperson in *Fuller* was not fully questioned so that it was "impossible to tell whether her own personal preference or bias would likely prevent her from following the law." *Id.* at n.2.

Murphy--7

of proof beyond a reasonable doubt and they are not challengeable for cause based upon the type and amount of evidence they require to reach that level of confidence. *Id.* at 127. Only if the venireperson would refuse to answer the issue “yes” unless a certain type of evidence is presented, even if the other evidence presented were sufficient to convince them of the special issue beyond a reasonable doubt, would the venireperson be challengeable for cause. *Id.* Accordingly, the trial court erred in granting the State’s challenge for cause against Treat. Treat was entitled to determine for herself what future dangerousness meant to her. That she would require a murder or attempted murder did not render her challengeable for cause. *Id.*

But Treat’s exclusion from the jury may not necessarily be cause for reversal. *See Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)(stating that except for certain federal constitutional errors labeled by United States Supreme Court as “structural,” no error is categorically immune to harmless error analysis). Appellant claims Treat’s erroneous exclusion violates Article 35.16, *Witherspoon*, and the Fourteenth Amendment. As to appellant’s Article 35.16 claim, appellant must show that the erroneously granted challenge for cause deprived him of a lawfully constituted jury. *Feldman v. State*, 71 S.W.3d 738, 749 (Tex. Crim. App. 2002); *Brooks v. State*, 990 S.W.2d 278, 289 (Tex. Crim. App.), *cert. denied*, 528 U.S. 956 (1999); *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998), *cert. denied*, 582 U.S. 985 (1999). He has made no such showing here. Point of error three is overruled.

Murphy--8

Witherspoon error, however, is not subject to a harm analysis under *Jones*, 982 S.W.2d at 391. We stated in *Jones* that, “[o]nly in very limited circumstances, when a juror is erroneously excluded because of general opposition to the death penalty (“*Witherspoon*” error), does the exclusion of a juror by an unintentional mistake amount to a constitutional violation.” *Id.* Under *Witherspoon*, a venireperson would be excluded “only where they made it unmistakably clear they would automatically vote against the imposition of the death penalty, or where their attitude would preclude them from making an impartial determination of guilt or innocence.” *Drinkard v. State*, 776 S.W.2d 181, 182 (Tex. Crim. App. 1989). In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court abandoned *Witherspoon*’s substantive standard and its burden of proof requirement. *Id.* *Wainwright* reaffirmed the *Adams v. Texas*, 448 U.S. 38 (1980), standard for determining when a veniremember may be excluded for cause due to his or her views on capital punishment, holding that the critical inquiry is “whether a juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id.* (discussing *Wainwright*, 469 U.S. at 424).

Treat was excluded in this case because her own definition of the phrase “criminal acts of violence” would require evidence that appellant committed or attempted to commit other murders. While the phrase at issue is embedded within our capital death penalty provision which itself is continually assessed for its ability to hold up against federal constitutional standards, the wrongful elimination of a juror for establishing her own

Murphy--9

definition of that phrase does not implicate *Witherspoon/Wainwright*. Treat harbored no general opposition to the death penalty. She was not excluded because her views on capital punishment in general would prevent or impair her performance. Point of error four is overruled.

In points of error five through eight, appellant claims the trial court erred by denying appellant's challenges for cause against four venirepersons. Appellant claims these venirepersons were all biased against the law and therefore his challenges for cause should have been granted.³

During the voir dire of venireperson Phillip Mays, defense counsel asked him about times when "the laws of man conflict with the laws of God, specifically the Ten Commandments." Pointing to Mays' statement that he was not sure where the two would conflict, but if they did, he would side with his religious beliefs, appellant concludes that Mays was therefore challengeable for cause on the ground that he would be impaired in his ability to follow the law.

Appellant failed to demonstrate that Mays was first informed that he would be required to take an oath that in the case of any conflict between the tenets of Mays' religion and the law on which Mays would be instructed, Mays would be required to follow the law. In the absence of a showing that Mays was fully informed as to the applicable law, appellant

³ We assume, without deciding, that appellant preserved his complaints for review.

Murphy--10

has failed to show that Mays was biased or prejudiced against the law. *See Curry v. State*, 910 S.W.2d 490, 493 (Tex. Crim. App. 1995); *Chambers v. State*, 903 S.W.2d 21, 29 (Tex. Crim. App. 1995).

Appellant claims venireperson John Robuck was challengeable for cause because he could not consider the full range of punishment. Appellant claims Robuck could not consider five years as a punishment for an intentional murder. But a review of the record reflects that when the trial court asked Robuck to consider some hypothetical scenarios in which five years might be an appropriate punishment, Robuck agreed that he could consider five years and stated that it “completely depends on the circumstance[s].” Appellant has not shown that Robuck could not consider the full range of punishment for murder.

Appellant claims veniremembers Thomas Brooks and Kimberly Williams each equated the term “probability” of future dangerousness with “possibility.” He complains that the trial court should have granted his challenges for cause against them on that basis.

During the State’s voir dire, Brooks explained his understanding of the term “probability” as meaning “not definite.” During questioning by defense counsel, Brooks explained that it meant “[i]t’s not a definite thing.” He stated that it was something that was “possible in the future” but that he could not “put a number on it.” He stated it was “a chance.” During Williams’ voir dire by the State, Williams stated that “probability” meant “it’s possible it could, or could have not.” Upon further questioning, she agreed that it would have to be more than fifty percent chance on a scale of zero to one hundred. When

Murphy--11

questioned by defense counsel Williams reiterated that she would define probability as a possibility. When questioned about percentages by the trial court, Williams could not say. She continued to reiterate that she believed probability and possibility mean the same thing.

Appellant relies on *Hughes v. State*, 878 S.W.2d 142, 148 (Tex. Crim. App. 1992), in which the Court reversed a conviction based upon an erroneous denial of a challenge for cause against a venireperson who equated the term “probability” with “possibility.” We held:

[The venireperson’s] answers during his voir dire indicate that he understood “probability” as any percent possibility rather than as a “likelihood” or “good chance[.]” In its usual acceptation, a “probability” is something more than a “possibility.” As this Court stated in *Smith*, 779 S.W.2d 417, 421, in which we relied on *Cuevas v. State*, 742 S.W.2d 331 (Tex. Crim. App. 1987)], “we know that the second special issue calls for proof of more than a bare chance of future violence.” Requiring more than a mere possibility that the defendant would commit criminal acts of violence and would constitute a continuing threat to society prevents the freakish and wanton assessment of the death penalty.

Since [the venireperson] understood “probability” as only a “possibility”, he was properly challengeable for cause. We hold the trial court abused its discretion in denying appellant's challenge.

Id. (footnotes omitted).

Assuming Brooks’ and Williams’ understandings of the term probability was erroneous, appellant has not shown that he was entitled to strike them for cause. Although we have held that the term “probability” need not be defined, we have also held that the terms means “more than a mere possibility.” *Id.* Further, it must be explained to the veniremember that the law requires him to see and accept the distinction between the terms as set forth in *Hughes*. Once explained the law, if the prospective jurors continue to insist upon an

Murphy--12

definition or understanding of the term that is inconsistent with *Hughes*, then they may be challengeable for cause. In these circumstances, where the law was not carefully or adequately explained to Williams and Brooks, the trial court did not abuse its discretion in denying appellant's challenges for cause. Points of error five through eight are overruled.

In point of error nine, appellant claims he was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, during voir dire, when his trial counsel used peremptory strikes against two venirepersons whom counsel erroneously believed he had unsuccessfully challenged for cause. Stating that his challenge for cause against venireperson Mark Colditz had been denied, defense counsel utilized a peremptory strike against him. But the record reflects that Colditz was not submitted for cause by appellant. Also erroneously stating his challenge for cause against venireperson John Wilson was denied, defense counsel exercised a peremptory strike against him.

In order to prevail on a claim of ineffective assistance of counsel, appellant must prove by a preponderance of the evidence (1) that counsel's performance was deficient; and (2) that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). We have repeatedly stated that "[i]f counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Ortiz*

Murphy--13

v. *State*, 93 S.W.3d 79, 88 (Tex. Crim. App. 2002).

Despite appellant's counsel's mistaken belief about the challenges for cause, he may have ultimately utilized peremptory challenges against Wilson and Colditz for any number of legitimate reasons. As the State points out, review of their voir dire examinations reflects a number of issues that the defense might legitimately have found warranted peremptory strikes. For instance, Wilson had been a witness in a murder case after finding the body of an employee who was shot by a disgruntled fellow employee. Wilson was also a strong supporter of the death penalty and believed it should be available as a penalty for non-capital intentional murders. He had previously served on two criminal juries, both of which returned convictions. Finally, Wilson's father had an "extensive career" with the Dallas Police Department. Venireperson Colditz held opinions that might be viewed as unfavorable to the defense. He testified he would have a hard time considering alcohol, drug use, or even mental retardation to be mitigating evidence. He also stated initially that he would be "reluctant" to acquit for a failure to prove venue or for a *Miranda* violation, both of which were contested issues in the case. In light of this record, "there is at least the possibility" that counsel's use of peremptory strikes on Wilson and Colditz was reasonable trial strategy and accordingly, we defer to counsel's decision. *See id.* Point of error nine is overruled.

In his tenth point of error, appellant claims this appeal should be abated until the trial court files findings of fact and conclusions of law as required by Article 38.22. Appellant filed pretrial motions seeking suppression of his oral and written statements on the ground

Murphy--14

that they were involuntarily made. The trial court held a hearing outside the jury's presence, but did not enter written findings of fact and conclusions of law regarding the admissibility of the statements. However, at the close of the hearing, the trial court dictated its findings and conclusions into the record. A trial court satisfies the requirements of Article 38.22 when it dictates its findings and conclusions to the court reporter, and they are transcribed and made a part of the statement of facts, filed with the district clerk and made a part of the appellate record. *Parr v. State*, 658 S.W.2d 620, 623 (Tex. Crim. App. 1983); *see also Andrade v. State*, 6 S.W.3d 584, 592 (Tex. App.--Houston [14th Dist.] 1999, pet. ref'd)(following *Parr*); *Lee v. State*, 964 S.W.2d 3, 11-12 (Tex. App.--Houston [1st Dist.] 1997, pet. ref'd)(following *Parr*); *Amunson v. State*, 928 S.W.2d 601, 608 (Tex. App.--San Antonio 1996, pet. ref'd)(following *Parr*). That has been done in this case. Point of error ten is overruled.

In his eleventh point of error, appellant claims his rights pursuant to the Sixth Amendment of the United States Constitution were violated when the prosecutors examined letters and notes written by appellant to his trial attorneys which were protected by attorney-client privilege. Before trial, written materials, notes and letters, including three pages of handwritten notes to appellant's attorneys, were seized from appellant's jail cell by jail personnel after appellant attempted a suicide. The documents were viewed by prosecutors before trial. Appellant claims the seizure amounted to a knowing and unlawful intrusion of the attorney-client privilege by the State, and he is therefore entitled to a reversal.

Murphy--15

During trial, the court held a hearing outside the presence of the jury. An employee of the Dallas County Sheriff's Department testified that pursuant to the customary practice of the Dallas County Jail in the case of an attempted suicide in jail, the cell is considered a crime scene and all evidence is confiscated. Both prosecutors in appellant's case testified that they reviewed the seized papers, but only one of the prosecutors testified that he reviewed portions of the three pages purportedly written to appellant's attorneys. At the top of Defense Exhibit 6A, is written, "Michael & Jane (Sorry if I've offended you by using your 1st names)." It was signed on the back, "Sincerely, Jim Ed." The prosecutor agreed that he knew appellant's attorneys were Michael Byck and Jane Little, and that Jim Ed was a name appellant was known to go by. Defense Exhibit 6B, began "Questions for my lawyers" and was followed by six numbered paragraphs, and signed at the bottom by "Jim." Defense Exhibit 6C, stated on the back: "To my lawyers! Please help me with the problems I'm having, the staff sees me only as a monster." The other side began its narrative writing, "Michael" Substantively, they pertain almost exclusively to appellant's desire to contact a psychiatrist to prescribe medication to stop his hallucinations and prevent him from "losing his mind." The prosecutor who reviewed the papers testified that he did not use any information contained in them in his prosecution of appellant. The trial court concluded that if there was any error, it was harmless beyond a reasonable doubt. The court did find, however, that Defense Exhibits 6A, 6B and 6C were attorney-client privileged, but questioned whether they were located "in a secure and confidential place."

Murphy--16

The State's intrusion into the attorney-client relationship violates a defendant's constitutional right to counsel when the defendant is prejudiced by the violation. *United States v. Morrison*, 449 U.S. 361, 365-66 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 555-59 (1977). The federal circuit courts of appeals are split on the issue of whether prejudice is presumed or must be proven. Compare *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir.)(stating that possession by government of confidential information is presumed detrimental to defendant), *vacated on other grounds*, 712 F.2d 1444 (1983); *United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978)(holding prejudice need not be shown) with *United States v. Dien*, 609 F.2d 1038, 1043 (2nd Cir. 1979)(holding defendants failed to show prejudice); *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000)(holding showing of prejudice required), *cert. denied*, 531 U.S. 1181 (2001); *United States v. Steele*, 727 F.2d 580, 586-87 (6th Cir.)(holding appellants failed to show prejudice), *cert. denied*, 467 U.S. 1209 (1984). Even where a presumption is applied, some courts allow it to be rebutted. *Briggs*, 698 F.2d at 495 n.29 (noting government free to rebut presumption).

In our view, calling for a showing of prejudice is the better rule in light of the wide variety of circumstances under which the privilege might be breached. Moreover, such rule is consistent with our own case law. See *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)(only errors that Supreme Court has designated as "structural" are categorically immune from harmless error analysis).

The evidence reflects no prejudice to appellant. The prosecutor who reviewed the

Murphy--17

privileged documents testified that he did not use any of the information in the three pages of material in preparing the case. When questioned specifically about an issue discussed at trial that appellant's attorneys identified as potentially coming from the materials, the prosecutor pointed to several other sources in which he had obtained the information:

Q. [Defense attorney] Can you point out – outside of these letters that you said that you reviewed, can you point out to any place in your investigation that made mention of hallucinations?

A. [Prosecutor] I can point to several instances. . . . First of all, the defendant's jail records, I've reviewed those. When he was first booked into the Dallas County Jail, he made numerous complaints of hallucinations. I've also reviewed numerous medical records from the defendant's past, various institutions, including Glen Oaks Hospital in Greenville, Texas; the Andrews Center in Tyler, Texas; Timberlawn Psychiatric Hospital in Dallas, Texas. And my recollection is in all of those documents he's made complaints about hallucinations.

Q. And, Mr. Davis, yesterday you also talked to or examined a number of witnesses regarding their knowledge or hearing of any alter ego or split personality from the defendant; is that correct?

A. Yes.

Q. And can you tell us what source, absent these letters that you reviewed, that you came across that information?

A. Glen Oaks Hospital records.

Because the proceedings were not adversely tainted by the intrusion into the attorney-client privilege, appellant is not entitled to a reversal. Point of error eleven is overruled.

In his twelfth point of error, appellant claims the evidence was insufficient to prove venue. At the close of the State's case, appellant sought a directed verdict on the ground that

Murphy--18

the evidence was insufficient to prove venue in Dallas County. Appellant's motion for a directed verdict was denied. The jury was charged that venue was proper in any one of the following counties:

- (1) in the county in which the offense was committed, or
- (2) where the property is stolen in one county and removed by the offender to another, in the county where the defendant took the property or in any other county through or into which he may have removed the same, or
- (3) if a person receives an injury in one county and dies in another by reason of such injury, in the county where the injury was received or where the death occurred, or in the county where the dead body is found, or
- (4) in the county in which the kidnapping offense was committed, or in any county through, into, or out of which the person kidnapped may have been taken.

However, if an offense has been committed within this State and it cannot readily be determined within which county or counties the commission took place, trial may be held in the county in which the defendant resides, in the county in which he was apprehended, or in the county to which he was extradited.

Appellant objected to the charge, arguing that venue should be limited to the county where the homicide occurred. Appellant's objections were overruled. Appellant does not complain in this appeal about the court's instructions, but alleges only that the evidence is insufficient to prove venue in Dallas County.

Under Article 13.18, if venue is not specifically stated, then the proper county for prosecution is the county in which the offense was committed. In this appeal, appellant reasons that since there is no statute specifically governing capital murder cases, Article

Murphy--19

13.18 applies. Applicant argues that “the county in which the offense was committed” in a capital murder case should be the county in which the homicide occurred. He further argues that if venue were so restricted, the evidence would be insufficient to prove the homicide occurred in Dallas County.

The State need prove venue only by a preponderance of the evidence. Art. 13.17. We recently explained the effect and purpose of special venue provisions:

In Texas, if the Legislature has not specified venue for a specific type of crime, then “the proper county for the prosecution of offenses is that in which the offense was committed.” Special venue statutes, however, expand the number of counties in which an offense may be prosecuted. These special venue statutes have been enacted for various reasons, such as: 1) the difficulty of proving precisely where the offense was committed; 2) the location where evidence of the crime is found; 3) the effect that a crime may have upon several different counties; or 4) the effect that the actor may have upon various counties. Texas venue statutes are a species of codified “substantial contacts” jurisdiction; thus, for venue to lie, the defendant, his conduct, his victim, or the fruits of his crime must have some relationship to the prosecuting county. The Legislature has specified the types of contacts that satisfy this “substantial contacts” threshold for various offenses.

Soliz v. State, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003)(footnotes omitted). While some of the special venue statutes expressly apply to identifiable penal code offenses, other special venue provisions apply by virtue of the particular facts of the case rather than the specifically charged offense. *Compare* Art. 13.12 (applicable to false imprisonment and kidnapping prosecution); Art. 13.13 (applicable to prosecution of criminal conspiracy); Art. 13.14 (applicable when prosecuting bigamy) *with* Art. 13.01 (applicable to “offenses committed wholly or in part outside this State”); Art. 13.04 (applicable to “offenses committed on the

Murphy--20

boundaries of two or more counties, or within four hundred yards thereof"); Art. 13.06 (applicable to offenses committed on rivers or streams); Art. 13.07 (applicable in case in which victim receives injury in one county and dies in another). There is no special venue statute expressly applicable to the prosecution of a capital murder. Nor is there any statute providing that in capital murder cases, venue occurs only where the homicide takes place. Any number of the special venue provisions may apply to a given capital murder case, depending upon its facts.

In the instant case, the victim was last seen alive in Collin County. In his confession, appellant stated that he was drinking at a bar called Bleachers. There was evidence that Bleachers Sports Grill is a bar located in Dallas County. According to his confession, appellant left Bleachers and hitched a ride with the victim "on the road beside Bleachers on [his] way to 635." Detective Myers testified that the area from Bleachers to 635 is located in Dallas County. Appellant's confession further states that appellant and the victim were driving toward 635 when he asked the victim to stop and get into the trunk, and he then shot her. The admission suggests that this occurred somewhere in the same area as the abduction-between Bleachers and 635, within Dallas County. Appellant thereafter drove around in the victim's car to various locations in Collin and Dallas Counties, using the victim's credit cards and attempting to use her ATM card. The medical examiner testified that although the gunshot wound was fatal, the victim could have lived for several minutes or longer after the shooting. The victim's body was discovered in a creek in Van Zandt County. Finally, the

Murphy--21

evidence showed that at the time of the offense, appellant's residence was in Dallas County.

Venue will stand if it is sufficient under any one of the venue provisions the jury was instructed upon. *Cf. Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000)(holding that in capital murder case, evidence must be sufficient to prove one of disjunctively alleged underlying offenses); *Brooks*, 990 S.W.2d at 384 (stating that when jury returns general guilty verdict on indictment disjunctively charging alternative theories of committing same offense, verdict stands if evidence supports any of theories charged). Article 13.19 provides that if an offense is committed within the state but "cannot readily be determined within which county or counties the commission took place," trial can be held in the county in which the defendant resides, the county where he is apprehended, or the county to which he is extradited. This provision was made a part of the trial court's charge. Given the difficulty of determining exactly where the offense occurred, a rational jury could have relied on this provision and concluded venue was proper in Dallas County, the county of appellant's residence. Point of error twelve is overruled.

In his thirteenth point of error, appellant claims the trial court abused its discretion by denying appellant's request during the punishment phase of the trial to suppress an out-of-court photographic identification of appellant made by Sherryl Wilhelm, in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. Wilhelm testified at a hearing outside the presence of the jury that in August of 1997, she went out to her car on lunch break while working at Arlington Memorial Hospital. When she opened her

Murphy--22

car door, a man pushed her from behind and followed her into the car. Wilhelm made several attempts to open the passenger door until the man started to choke her. He ordered her onto the floor board with her face down in the seat, while he drove out of the parking lot. Wilhelm gradually worked her way upright onto the passenger seat and was allowed to sit up. When the car slowed down at a traffic light, Wilhelm jumped out and rolled onto the street. She received help from another motorist. She described her abductor as white, clean-cut with a short haircut, an earring, a five-o'clock shadow, slender build, medium to tall height and in his early twenties. Wilhelm said there was nothing obscuring his face and she was in the car with him for approximately thirty minutes. Douglas H. Ligon, a police officer trained in producing composite sketches, worked with Wilhelm in composing a drawing of her abductor. Ligon testified that Wilhelm also described the man as having dark hair and being olive-complected. In October 2000, while watching a television news report about the instant case, Wilhelm saw a composite drawing of the suspect for this offense and recognized him as the same man who had abducted her. She contacted Detective John Stanton, of the Arlington Police Department, who had investigated her case earlier.

Detective Stanton testified that he put together a lineup of six photos, including appellant's picture, for Wilhelm to view. He told Wilhelm that the suspect might or might not be in the lineup, and that it wasn't necessary for her to choose anyone. He testified that when Wilhelm viewed photo number five, appellant's photo, she stopped and there was a visible change in her demeanor. Stanton stated that Wilhelm said, "oh my God, I'm - I'm

Murphy--23

virtually sure . . .” and that her voice was quivering. Stanton asked her if she was sure and she said she was as sure as she could be after this amount of time. Although appellant now asserts a number of reasons why the photo lineup was not reliable, at trial he objected solely on the ground that the photo lineup appeared to be made up of individuals of “different races.”

Because appellant objected solely on this basis, we will address the reliability of the lineup on this ground alone. The race of the suspects in the lineup is not stated in the record. However, we have reviewed the photo lineup, and all of the suspects appear to be similarly-complected. All of the suspects have short dark hair, slight facial hair, dark eyes, and are all about the same age. All suspects are shown from the neck up. Stanton testified that he was able to modify the photos by computer so that they all appeared similar in size, position, and background. None of the suspects stands out as apparently of a different race from the other suspects. The trial court did not abuse its discretion in overruling appellant’s objection to the reliability of the lineup on the basis of race. Point of error thirteen is overruled.

In his fourteenth point of error, appellant claims the trial court abused its discretion in denying his request for a jury instruction that would have required the jury to consider extraneous offenses only for the purpose of determining the future dangerousness special issue. This argument has been addressed and rejected previously. *Jackson v. State*, 992 S.W.2d 469, 478 (Tex. Crim. App. 1999). Point of error fourteen is overruled.

In point of error fifteen, appellant claims the trial court erred at punishment in failing

Murphy--24

to submit to the jury definitions of the terms “probability,” “criminal acts of violence,” and “continuing threat to society.” Appellant argues that without definitions for these critical terms, the statutory aggravating circumstances are not adequately narrowed, and the jury’s verdict is not rationally reviewable. This Court has repeatedly held that these terms are not unconstitutionally vague and the jury is presumed to understand them without an instruction. *Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002); *Ladd v. State*, 3 S.W.3d 547, 572 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000). Point of error fifteen is overruled.

In his sixteenth point of error, appellant claims the Texas death penalty scheme violated his rights against cruel and unusual punishment and to due process of law under the Eighth and Fourteenth Amendments to the United States Constitution by requiring at least ten votes for the jury to return a negative answer to the future dangerousness special issue and to return an affirmative answer on the mitigation issue. We have addressed this issue and upheld this scheme as constitutional. *Prystash v. State*, 3 S.W.3d 522, 536-37 (Tex. Crim. App. 1999)(citing numerous cases in support), *cert. denied*, 522 U.S. 1102 (2000). Point of error sixteen is overruled.

In point of error seventeen, appellant claims the Texas death penalty scheme denied appellant due process of law, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because of the impossibility of simultaneously restricting the jury’s discretion to impose the death penalty while also allowing the jury unlimited

Murphy--25

discretion to consider all evidence mitigating against the imposition of the death penalty. Appellant relies solely on Justice Blackmun's dissent from the United States Supreme Court's denial of certiorari in *Callins v. Collins*, 510 U.S. 1141 (1994)(Blackmun, J., dissenting). We have addressed and rejected identical claims. *Ladd*, 3 S.W.3d at 575. Point of error seventeen is overruled.

In point of error eighteen, appellant makes the same claim under Article I, sections 13 and 19 of the Texas Constitution, that he asserts in point of error seventeen. Because appellant does not argue that the Texas Constitution provides or should provide any different or greater protection in this regard, appellant fails to adequately brief this claim. TEX. R. APP. PROC. 38.1(h). Point of error eighteen is overruled.

In points of error nineteen and twenty, appellant claims the cumulative effect of the above enumerated constitutional violations denied him due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and due course of law under Article I, section 19 of the Texas Constitution. Because we have found little or no error in the above-alleged points, there is no harm or not enough harm to accumulate. Points of error nineteen and twenty are overruled.

The judgment of the trial court is affirmed.

Delivered June 25, 2003

Publish

74145

NO. 74,145

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

ORIGINAL

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

FILED IN
COURT OF CRIMINAL APPEALS

JUL 28 2003

Froy C. Bennett, Jr., Clerk

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant, by and through counsel, and files this Motion for Rehearing in the above styled and numbered case, and would respectfully show the following:

I.

Appellant's first Point of Error related to Appellant's request to ask prospective jurors whether they could follow the law by holding the State to its burden of proving future dangerousness beyond a reasonable doubt, notwithstanding the evidence of the victim's character. This Honorable Court overruled Appellant's issue first on the basis that

Appellant's trial counsel did not define "victim character testimony" or state on the record that this area of law would be explained before the question was asked. (Opinion, p. 3). With regard to what "victim character testimony" means, the record is absent of any indication of confusion on the part of the trial judge or the State as to its meaning. In fact, both sides knew going in that the trial record would bear out that the elderly victim in the case was a person of good character. At trial, the State introduced testimony that the victim was 80 years old at the time of the offense and lived alone. On the date of the offenses, she went to a mall far from home to pick up a robe for her disabled sister. She had loving family members and friends who were concerned about her welfare. (RXLVII,22-26). In closing argument, the State emphasized her good character, mentioning the fact that she was eighty-years old, totally innocent, and was helping her disabled sister at the time she was abducted. (R.LX,14-15). The State referred to her as a "good and saintly woman" who "was our neighbor, our helper. She was our sister. She was our grandmother. She was our mother. Even more than that, she was an example to all of us...on how you live your life with dignity and grace." (R.LX,58-59). It is no surprise that prior to voir dire, the record is absent of any confusion as to what Appellant meant with regard to "victim character testimony."

This Court further cites *Chambers v. State* and faults Appellant for not stating on the record that this particular area of the law would be explained to prospective jurors before Appellant asked the proposed questions. However, *Chambers* is clearly distinguishable since the analysis in that case revolved around the specific individual questioning of one

prospective juror who Chambers claimed should have been struck for cause. In the instant case, before the beginning of individual voir dire, the trial court judge himself explained in detail to all prospective jurors the law regarding the State's burden of proving future dangerousness beyond a reasonable doubt. Appellant reasonably wonders whether any fairly recent death penalty record could be found in which prospective jurors were *not* informed that the State bears the burden of proving future dangerousness beyond a reasonable doubt. To pour Appellant out for not simply stating on the record that this area of the law would first be explained ignores the reality of what actually occurred.

This Honorable Court's opinion further explains that since the standard of proof never changes, Appellant's questions asking whether jurors would change that standard could have been considered confusing or misleading. (Opinion, p. 3). Appellant asserts that simply asking whether prospective jurors can follow the law is hardly confusing or misleading. In fact, this Court has specifically approved asking jurors whether they can follow the law that requires them to disregard illegally obtained evidence, whether they could follow an instruction requiring corroboration of accomplice witness testimony, or whether they could follow the law that precludes jurors from considering a defendant's failure to testify. *Standefor v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001). Appellant's proposed questions asking whether jurors would hold the State to its burden of proving future dangerousness beyond a reasonable doubt can hardly be considered "confusing or misleading."

In considering Appellant's first Point of Error, this Court's opinion completely disregards the applicable analysis set out in *Standefer*. Pursuant to *Standefer*, Appellant's proposed questions were not improper since they sought only to determine whether prospective jurors could follow the law applicable in the case. Appellant's proposed questions were no different than asking whether jurors could give probation in a murder case, reject an illegally obtained confession, or find that accomplice witness testimony was not properly corroborated. Therefore, Appellant respectfully requests that this Court reexamine Appellant's first Point of Error and apply the analysis required by *Standefer*.

II.

As for Appellant's third and fourth Points of Error, this Honorable Court agrees that the trial court judge erred in granting the State's challenge for cause against veniremember Treat. However, this Court considers the error harmless where Appellant cannot show, pursuant to Article 35.16, that the trial court's error denied Appellant a lawfully constituted jury. (Opinion, p.7). Appellant asserts that the standard set out in *Jones* and its progeny sets a standard impossible for any appellant to overcome, and thereby gives trial courts the unlimited ability to improperly grant unfounded challenges for cause by the State. While Article 35.16 may appear to withstand this analysis, Appellant asserts that the Fourteenth Amendment to the United States Constitution does not. Appellant respectfully requests that this Court review its analysis of Appellant's third and fourth Points of Error pursuant to Appellant's federal constitutional claim.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests that this Honorable Court grant the foregoing motion for rehearing and upon rehearing, reverse the trial court judgement and remand the case for a new trial.

Respectfully Submitted,

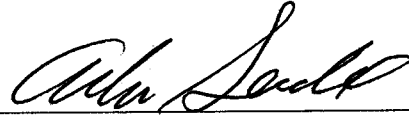
A handwritten signature in cursive script, appearing to read "Adam L. Seidel", is written over a horizontal line.

Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75219
ph. 214-237-0835
fax 214-237-0901
State Bar No. 17999290

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Court's Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, and to the Honorable Matthew Paul, State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711 on this the 25th day of July 2003.



Adam L. Seidel



JUDGMENT 8-2-02
MNT _____

CLERK'S RECORD 60 DAYS 10-7 120 DAYS _____ MT _____

REPORTERS RECORD 60 DAYS 10-7 120 DAYS _____ MT 4-5-

APPELLANT'S BRIEF _____

STATE'S BRIEF _____



COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

TROY C. BENNETT, JR.
CLERK
512 463-1551

RICHARD E. WETZEL
GENERAL COUNSEL
512 463-1600

February 24, 2003

Hon. Steven R. Emmert, Judge
31st Judicial District Court
P. O. Box 766
Wheeler, Texas 79096-0766

RE: CHRISTIPHER CHAD BRITTON
CCA NO. 74,525
TRIAL CRT. NO. 2507

Dear Judge Emmert:

The Court has received the Clerk's Record in the above styled case. The record, however, does not contain an order appointing counsel pursuant to Article 11.072 Section 2.

Please advise this Court at your earliest convenience whether Appellant's has appointed counsel. If counsel has not been appointed please proceed under Article 11.072 Section 2, and appoint habeas counsel.

The list of attorneys approved by this Court for such appointments is located at this Court's web site (<http://www.cca.courts.state.tx.us/rules/11071Rules/art11071.htm>). Upon making the appointment, please provide a copy of the order to this Court for approval of the appointment.

Thank you for your assistance in this matter.

Sincerely yours,
Troy C. Bennett, Jr.
Clerk

By:


Abel Acosta, Chief Deputy Clerk

cc: Warren L. Clark
Richard Roach
Charles Cole

31ST JUDICIAL DISTRICT COURT

Grey, Hemphill, Lipscomb, Roberts and Wheeler Counties

Steven R. Emmert
Judge PresidingP.O. Box 766
Wheeler, Texas 79096Toni McClendon
Court Reporter(806) 826-5501
Facsimile (806) 826-5503
distct31@yft.netSandy Rose
Court AdministratorWayne Carter
Court Bailiff

Date: April 15, 2003

To: Troy C. Bennett, Jr.
Clerk, Court of Criminal Appeals
(512) 463-7061

From: Hon. Steven R. Emmert

Re: Case No. 74,525
Britton, Christopher ChadMemo: Attached please find a copy of the Order Appointing Counsel for Writ of Habeas Corpus
for your information.

Please contact me if you need additional information in this regard.

Sincerely,

Steven R. Emmert
31st District JudgeOriginal to follow: ☐ Yes
☒ No

Total pages, including cover page: 2

CONFIDENTIALITY NOTICE

THE DOCUMENTS ACCOMPANYING THIS FACSIMILE TRANSMISSION CONTAIN CONFIDENTIAL INFORMATION WHICH IS LEGALLY PRIVILEGED. THE INFORMATION IS INTENDED ONLY FOR THE USE OF THE RECIPIENT NAMED ABOVE. IF YOU HAVE RECEIVED THIS FACSIMILE TRANSMISSION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE TO ARRANGE FOR RETURN OF THE TELECOPIED DOCUMENTS, AND YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION, OR THE TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS INFORMATION IS STRICTLY PROHIBITED.

74525

No. 2507

THE STATE OF TEXAS

VS.

CHRISTOPHER CHAD BRITTON

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||

IN THE 31ST DISTRICT COURT

IN AND FOR

HEMPHILL COUNTY, TEXAS


**ORDER APPOINTING COUNSEL
FOR WRIT OF HABEAS CORPUS**FILED
CHARLES COLLE
CLERK
HEMPHILL COUNTY TEXAS10:43 AM
APR 15 2003
B. P. Legu

On the 3rd day of April, 2003, the court conducted a hearing on the record for the purpose of ascertaining the defendant's indigent status and whether defendant desires to have counsel appointed for the purpose of a writ of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.071, Section 2.

The court finds that defendant is indigent and that defendant desires to have counsel appointed for the purpose of a writ of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.071, Section 2.

IT IS, THEREFORE, ORDERED that L. Van Williamson, 1017 West 10th Avenue, Amarillo, Texas 79101-3112, (806) 372-4431, is appointed as counsel for the defendant in this cause for the purpose of a writ of habeas corpus.

SIGNED this 3rd day of April, 2003.


Steven R. Emmert
Judge PresidingFILED IN
COURT OF CRIMINAL APPEAL

APR 15 2003

Troy C. Bennett, Jr., Clerk

April 15, 2003

L. Van Williamson
1017 W 10th St
Amarillo, TX 79101

Warren L. Clark
P O Box 2408
Amarillo, TX 79105

RE: Case No. 74,525
31ST DISTRICT COURT - 2507

Style: BRITTON, CHRISTOPHER CHAD

Dear Counsel:

The order appointing, L. Van Williamson, counsel pursuant to Article 11.071, V.A.C.C.P. in the above styled and numbered cause has been received and approved by the Court.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 

Deputy

cc: Richard J. Roach

July 07, 2003

Re: Case No. AP-74,145

COA#:

STYLE: MURPHY, JEDIDIAH ISAAC

On this day, this Court has granted the Appellant's motion for an extension of time in which to file the motion for rehearing. The time to file the said item has been extended to **July 25, 2003**. NO FURTHER EXTENSIONS WILL BE ENTERTAINED.

Troy C. Bennett, Jr., Clerk

ADAM L. SEIDEL
ATTORNEY AT LAW
CHATEAU PLAZA SUITE 1400
2515 MCKINNEY AVENUE
DALLAS TX 75201

NO. 74,145

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

ORIGINAL

FILED IN
COURT OF CRIMINAL APPEALS
JUL 07 2003

Troy C. Bennett, Jr., Clerk

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

**APPELLANT'S FIRST MOTION FOR EXTENSION
OF TIME TO FILE MOTION FOR REHEARING**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW the Appellant, by and through counsel, and files this Motion seeking to extend the time for filing a Motion for Rehearing in the above styled and numbered case, and would respectfully show the following:

I.

The current deadline for filing a Motion for Rehearing is July 10, 2003.

II.

The length of the extension sought is fifteen days, to July 25, 2003.

III.

The facts relied upon to reasonably explain the need for an extension are the following:


1. Counsel is lead counsel in a murder trial set the week of July 7th in the 204th Judicial District Court of Dallas County, styled State v. Jose Juarez.
2. This Court's opinion addresses Appellant's twenty points of error and is contained in twenty-five pages. Counsel respectfully requests additional time in which to properly prepare a motion for rehearing.

IV.

No previous extensions to file a motion for rehearing have been requested or granted.

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Honorable Court grant the foregoing Motion and extend the time for filing Appellant's Motion for Rehearing to July 25, 2003.

Respectfully Submitted,



Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75219
ph. 214-237-0835
fax 214-237-0901
State Bar No. 17999290

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Court's Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on this the 1st day of July 2003.

A handwritten signature in black ink, appearing to read 'Adam L. Seidel', is written over a horizontal line.

Adam L. Seidel

July 07, 2003

Re: Case No. AP-74,525

STYLE: BRITTON, CHRISTOPHER CHAD



The appellant's motion for extension of time within which to file the appellant's brief is granted. The time for filing the appellant's brief has been extended to **December 22, 2003**. **NO FURTHER EXTENSIONS WILL BE ENTERTAINED.** Failure to file appellant's brief may result in the issuance of a show cause order and/or judgment of contempt.

SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

P.O. BOX 12308, CAPITOL STATION

AUSTIN, TEXAS 78711

Troy C. Bennett, Jr., Clerk

TROY C. BENNETT, JR.
CLERK
512 463-1551

RICHARD E. WETZEL
GENERAL COUNSEL
512 463-1600

WARREN L. CLARK
PO BOX 2408
AMARILLO TX 79105

IN THE COURT OF CRIMINAL APPEALS

AT AUSTIN

CHRISTOPHER CHAD BRITTON,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

§
§
§
§
§
§
§

NO. 74,525

FILED IN
COURT OF CRIMINAL APPEALS

JUL 03 2003

Troy C. Bennett, Jr., Clerk

MOTION TO EXTEND TIME FOR
FILING APPELLANT'S BRIEF

ORIGINAL

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, CHRISTOPHER CHAD BRITTON, Appellant herein, acting by and through his counsel of record, WARREN L. CLARK, and in accordance with Rules 10.5(b) and 38.6(d) of the TEXAS RULES OF APPELLATE PROCEDURE, hereby requests an extension of time in which to file Appellant's brief and would respectfully show the Court:

1. Name of trial court: 31st District Court of Hemphill County, Texas (181st District Court of Potter County, Texas on change of venue);
2. Date of Judgement: Sentence pronounced on August 8, 2002;
3. Trial court style: No. 2507, The State of Texas vs. Christopher Chad Britton in the 31st District Court in and for Hemphill County, Texas (No. 45373-B in the 181st District Court in and for Potter County, Texas on change of venue);
4. Offense: capital murder;
5. Punishment assessed: death by lethal injection;
6. Date of filing of Motion for New Trial: N/A
7. Present filing deadline: July 24, 2003;

8. Length of extension requested: six (6) months;
9. Number of previous extensions: None;
10. Good cause for this extension is as follows:

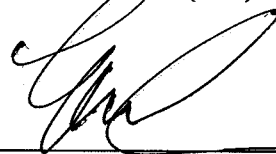
Undersigned counsel is a solo practitioner. He employs no law clerks or paralegals. He is solely responsible for prosecution of the above-styled appeal. The appellate record in this appeal is lengthy. It consists of 37 volumes, not counting the exhibit volumes. The pre-trial volumes run 283 pages. The volumes containing all voir dire examination of all venirepersons run 4,748 pages. The volumes containing testimony from the guilt-innocence and punishments phases run 1,838 pages.

As the Court may or may not be aware, undersigned counsel is also the responsible attorney on another capital appeal styled *The State of Texas v. Ryan Heath Dickson*, No. 73,533, pending in this Court. On March 28, 2003, counsel requested and received a six-month extension to file his brief in that appeal. The record in the *Dickson* appeal is in fact longer than the instant record. Counsel is presently at work on this appeal and anticipates making the September 14, 2003 filing date.

This six month extension is necessary given the special demands of prosecuting the *Dickson* appeal in a timely fashion and needing sufficient time to review the instant record and prepare the brief on appeal.

Respectfully submitted,

WARREN L. CLARK
ATTORNEY AT LAW
203 W. 8th Ave., Ste. 320
P. O. Box 2408 (79105)
Amarillo, Texas 79101
806/379-7655
806/371-9610 (fax)



Attorney for Appellant
SBN # 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Extension of Time for Filing Appellant's Brief was provided to the office of the Hemphill County District Attorney on this the 27 day of June, 2003.



Warren L. Clark

Tuesday, June 24, 2003

Re: Case No. AP-74,525

Tr. Ct. No. 2507

STYLE: BRITTON, CHRISTOPHER CHAD

I have this day received and filed the Reporter's Record in the above-styled and numbered cause. The appellant's brief is due on **Thursday, July 24, 2003**.

Troy C. Bennett, Jr., Clerk

J. LARRY PORTON
OFFICIAL COURT REPORTER
P O BOX 614
WHEELER TX 79096-0614

March 10, 2003

Warren L. Clark
P O Box 2408
Amarillo, TX 79105

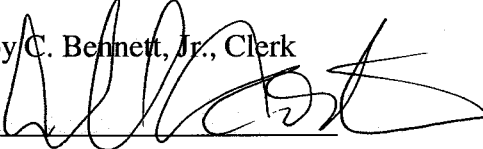
RE: Case No. 74,525
31ST DISTRICT COURT - 2507

Style: BRITTON, CHRISTOPHER CHAD

Dear Counsel:

The Motion for Extension of Time to File the Reporter's Record is granted. The time for filing the Reporter's Record has been extended to 06-08-03. NO FURTHER MOTIONS FOR EXTENSION OF TIME WILL BE ENTERTAINED. FAILURE TO FILE THE REPORTER'S RECORD BY THE DATE HEREIN SET FORTH MAY RESULT IN THE ISSUANCE OF A SHOW CAUSE ORDER AND/OR JUDGMENT OF CONTEMPT.

Sincerely yours,

Troy C. Bennett, Jr., Clerk
By: 
Deputy

cc: Charles Cole
Judge Presiding
J. LARRY PORTON
Richard J. Roach

**COURT REPORTER'S REQUEST FOR EXTENSION OF TIME
TO FILE REPORTER'S RECORD**

Appellate Case Number: **74,525**

Trial Court Number: **45,373-B**

Style: THE STATE OF TEXAS

Counsel Requesting Record:

Warren L. Clark

310 West 6th Avenue

P. O. Box 2408

Amarillo, Texas 79105

(806)379-7655

VS.

CHRISTOPHER CHAD BRITTON

I, J. LARRY PORTON, Official Court Reporter for the 31st Judicial District, am unable to file the Reporter's Record in the above styled case by 04-08-2003 for the following reasons:

1. Was told a Motion for New Trial had been filed.
2. Designation of Record was not received until December 13, 2002.
3. Length of record.
4. Health problems. Hospitalized November, 2002, January, 2003 and February 2003. Pace maker implanted February 24, 2003 due to slow and irregular heartbeat.
(See attached letter from physician.)

I estimate the record in this appeal to be approximately 10,000 pages.

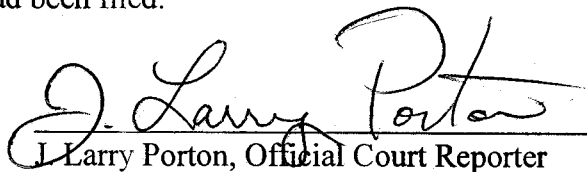
The record covers eight (8) weeks of testimony.

It is respectfully requested that a 90 day extension be granted to 06-08-2003, which would be the final date if Motion for New Trial had been filed.

**FILED IN
COURT OF CRIMINAL APPEALS**

MAR 10 2003

Troy C. Bennett, Jr., Clerk


J. Larry Porton, Official Court Reporter

31st District Court

P. O. Box 614

Wheeler, Texas 79096

(806)826-5501 Telephone

(806)826-5503 Fax

03-03-2003

TO WHOM IT MAY CONCERN,

Since the middle of January, Mr. Larry Porton has had considerable cardiovascular problems including hospitalization for atrial fibrillation with fast ventricular response, several visits to the family physician and cardiologist. He, also, was seen by Dr. Glen Friesen and had a pacemaker placement on 2-24-2003.

In light of the above health problems, I am requesting for this patient consideration of an extension for completion of court records.

Sincerely,



ROBERT C. GALUTIA, M.D.
Parkview Clinic
P.O. BOX 159
Wheeler, TX 79096

FILED IN
COURT OF CRIMINAL APPEALS

MAR 10 2003

Troy C. Bennett, Jr., Clerk

**IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS**

CHRISTOPHER CHAD BRITTON,
Appellant

VS.

THE STATE OF TEXAS

X
X
X
X
X
X
X
X

NO. 74,525

**FILED IN
COURT OF CRIMINAL APPEALS**

MAR 10 2003

AFFIDAVIT

Troy C. Bennett, Jr., Clerk

BEFORE ME, the undersigned authority, personally appeared Warren L. Clark,
who, upon his oath, did depose and state the following:

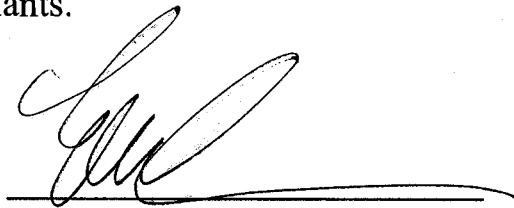
My name is Warren L. Clark and I am a licensed lawyer in the State of Texas.
I served as lead counsel for Appellant Christopher Chad Britton during his capital
murder trial held in Potter County, Texas during the months of June through August
of 2002. I have also been appointed by the 31st District Court to prosecute the appeal
in the case to this Court.

On March 2, 2003, undersigned counsel received notice from the Court that the
Reporter's Record had not been filed with the Court and that absent a properly filed
Motion For Extension of Time, the court reporter faced the possible issuance of a
Notice To Show Cause or Judgment of Contempt. I have been requested to submit
this affidavit in support of the court reporter's anticipated motion to extend.

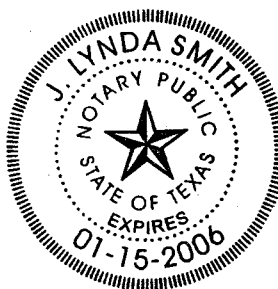
In December of 2002, undersigned counsel was appointed by the 47th District Court of Potter County to prosecute the appeal arising from a capital murder conviction in a case styled *Ryan Heath Dickson v. The State of Texas*, Trial Court No. 38,006-A. The Clerk's Record and Reporter's Record in this case will be, if not already, filed with this Court during this week, March 3, 2003. The record in this cause is huge, running well over 15,000 pages. It will necessarily take undersigned counsel several months to read and analyze the record, much less research potential error and reduce same in the form of a brief for the Court. Counsel anticipates requesting a length extension to prepare the brief in this particular case.


On the other hand, in the absence of an extension in the *Britton* appeal, counsel will be forced to prepare two appeals from two very lengthy records at virtually the same time. From personal experience, counsel estimates that the running length of the *Britton* appeal will run some 10,000 pages. Faced with this daunting task, undersigned counsel will most likely be unable to complete both tasks within the anticipated time framework and thus, may very well have to seek withdrawal from at least one of the appeals. This will force the trial court to appoint new counsel to plow, in effect, old ground and essentially duplicate efforts needlessly. Granting an extension up to six months to the court reporter in the instant case will permit undersigned to carry out his duties on both appeals, thereby providing effective

assistance of counsel to both indigent appellants.


Warren L. Clark

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority
on this the 4th day of March, 2003.




NOTARY PUBLIC in and for
STATE OF TEXAS

February 24, 2003

Warren L. Clark
P O Box 2408
Amarillo, TX 79105

RE: Case No. 74,525
31ST DISTRICT COURT - 2507

Style: BRITTON, CHRISTOPHER CHAD

Dear Counsel:

The Court Reporter has failed to file the reporters record in the above referenced cause. To avoid the issuance of a Notice to Show Cause or Judgment of Contempt, the Court Reporter must file a Motion for Extension of Time or such motion along with the reporters record with this Court immediately.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: _____
Deputy

cc: Charles Cole
Judge Presiding
J. LARRY PORTON
Richard J. Roach

February 24, 2003

Warren L. Clark
P O Box 2408
Amarillo, TX 79105

RE: Case No. 74,525
31ST DISTRICT COURT - 2507

Style: BRITTON, CHRISTOPHER CHAD

Dear Counsel:

I have this day received and filed the Clerk's Record in
the above-styled and numbered cause.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 

Deputy

cc: Charles Cole
Judge Presiding
J. LARRY PORTON
Richard J. Roach

January 9, 2003

Warren L. Clark
P O Box 2408
Amarillo, TX 79105

RE: Case No. 74,525
31ST DISTRICT COURT - 2507

Style: BRITTON, CHRISTOPHER CHAD

Dear Counsel:

The District Clerk's Motion for Extension of time to file the Clerk's Record has been granted. The time for filing the Clerk's Record has been extended to 03-03-03.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Charles Cole
Judge Presiding
J. LARRY PORTON
Richard J. Roach

**HEMPHILL COUNTY &
31ST JUDICIAL DISTRICT CLERK**

Charles Cole - Clerk

Donna Walser - Deputy Clerk / Brenda Perrin - Deputy Clerk

P.O. BOX 867 - 400 MAIN STREET

CANADIAN, TEXAS 79014-0867

PHONE [806] 323-6212

**FILED IN
COURT OF CRIMINAL APPEALS**

JANUARY 6, 2003

JAN 9 2003

STATE COURT OF CRIMINAL APPEALS
P. O. BOX 12308
AUSTIN, TEXAS 78711-2308

Troy C. Bennett, Jr., Clerk
CERTIFIED MAIL
7000 1670 0002 9437 4169
RETURN RECEIPT REQUESTED

ATTENTION: MR. ABEL ACOSTA

SUBJECT: AUTOMATIC APPEAL
CAUSE NO. 2507

THE STATE OF TEXAS vs. CHRISTOPHER CHAD BRITTON
FILED IN THE 31ST JUDICIAL DISTRICT COURT ON JUNE 28, 2001
JUDGE PRESIDING: HONORABLE STEVEN R. EMMERT
CHANGE OF VENUE TO POTTER COUNTY, TEXAS

MR. ACOSTA:

AS PER OUR TELEPHONE CONVERSATION ON JANUARY 2, 2003, I AM REQUESTING AN EXTENSION OF SIXTY [60] DAYS FROM THIS DATE TO COMPLETE THE CLERK'S RECORD REGARDING THE ABOVE CAPTIONED CAUSE.

PLEASE ADVISE OUR OFFICE IF THIS REQUEST IS GRANTED.

THANK YOU.

SINCERELY,



Charles Cole
Hemphill County / District Clerk

No. 45,373-B

THE STATE OF TEXAS

§ IN THE 181ST DISTRICT COURT

§

§

VS.

§

IN AND FOR

§

§

CHRISTOPHER CHAD BRITTON

§

POTTER COUNTY, TEXAS

FILED IN
COURT OF CRIMINAL APPEALS

JAN 2 2003

ORDER OF APPOINTMENT OF APPELLATE COUNSEL

Troy C. Bennett, Jr., Clerk

CAME ON TO BE HEARD on this the 22nd day of August, 2002, the

matter of appointment of appellate counsel for Defendant CHRISTOPHER CHAD BRITTON. The Court, after having consulted with Defendant's trial counsel, having reviewed the Court's file and being familiar with performance of counsel during trial, finds that good cause exists for the appointment of trial counsel Warren L. Clark to represent Defendant on appeal.

In support of its finding of good cause, the Court concludes that trial counsel is intimately familiar with the entire record in the case, including all proceedings at the pre-trial, jury selection, guilt-innocence and punishment phases of the trial, and that appointment of trial counsel will promote judicial economy and efficiency in the appellate process. Further, the Court, being familiar with the record and performance of counsel, finds no evidence of any conflict of interest which might preclude trial counsel from rendering effective assistance of counsel on appeal.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Warren

371093

L. Clark is hereby appointed to represent Defendant Christopher Chad Britton on direct appeal to the Court of Criminal Appeals in Austin, Texas in the above-styled and numbered cause.

SIGNED AND ENTERED on this the 27 day of August, 2002.



JUDGE PRESIDING

Cause No. 45,373-B (Single Count)TRN 004198756X

THE STATE OF TEXAS § IN THE 181ST JUDICIAL
v. § DISTRICT COURT OF
CHRISTOPHER CHAD § POTTER COUNTY, TEXAS
BRITTON, DEFENDANT
SID: TX 06374511

JUDGMENT OF CONVICTION BY JURY;
SENTENCE BY JURY TO DEATH

DATE OF JUDGMENT: August 8, 2002
JUDGE PRESIDING: Steven R. Emmert
ATTORNEY FOR THE STATE: John Neal and Mac Cobb
ATTORNEY FOR THE DEFENDANT: Warren Clark and Mark Buzzard
OFFENSE: CAPITAL MURDER
STATUTE FOR OFFENSE: Section 19.03, Penal Code
DEGREE OF OFFENSE: Capital Felony
APPLICABLE PUNISHMENT RANGE
(including enhancements, if any): Life or Death
DATE OF OFFENSE: June 17, 2001
CHARGING INSTRUMENT: Indictment
PLEA TO OFFENSE: Not Guilty
PLEA TO ENHANCEMENT Not Applicable
PARAGRAPH(S):
VERDICT FOR OFFENSE: Guilty
FINDING ON ENHANCEMENT: Not Applicable
AFFIRMATIVE FINDING ON Not Applicable
DEADLY WEAPON:
OTHER AFFIRMATIVE Not Applicable
SPECIAL FINDINGS:
DATE SENTENCE IMPOSED: August 8, 2002
PUNISHMENT AND PLACE OF DEATH
CONFINEMENT:
TIME CREDITED TO SENTENCE: 418 days
COURT COSTS: See attached
TOTAL AMOUNT OF RESTITUTION: \$ N/A
NAME AND ADDRESS FOR
RESTITUTION:

FILED IN
COURT OF CRIMINAL APPEALS

JAN 2 2003

Iroy C. Bennett, Jr., Clerk

The Sex Offender Registration Requirements under Chapter 62, CCP, do not apply to the Defendant. The age of the victim at the time of the offense was not applicable.

This sentence shall run concurrently unless otherwise specified.

2002 AUG -8 P 11:04

On the date stated above, the above numbered and entitled cause was regularly reached and called for trial, and the State appeared by the attorney stated above, and the Defendant and the Defendant's attorney, as stated above, were also present. Thereupon both sides announced ready for trial, and the Defendant pleaded not guilty and a jury, to wit: Jimmy Muncy, and

eleven others, was duly selected, impaneled and sworn. Having heard the evidence submitted and having been duly charged by the Court, the jury retired to consider their verdict. Afterward, being brought into open court by the proper officer, the Defendant, the Defendant's attorney, and the State's attorney being present, and being asked if the jury had agreed upon a verdict, the jury answered it had and returned to the Court a verdict, which was read aloud, received by the Court, and is now entered upon the Minutes of the Court as follows:

We, the jury, find the Defendant, CHRISTOPHER CHAD BRITTON, guilty of the offense of CAPITAL MURDER as charged in the indictment.

Jimmy Muncy
Presiding Juror

Thereupon, the Defendant having previously elected to have the punishment assessed by the jury, pleaded to the enhancement paragraphs, if any, as stated above, and the jury was called back into the box and heard evidence related to the question of punishment. Thereafter, the jury retired to consider such question and, after having deliberated, the jury was brought back into open court by the proper officer, the Defendant, the Defendant's attorney, and the State's attorney being present, and being asked if the jury had agreed upon a verdict, the jury answered it had and returned to the Court a verdict, which was read aloud, received by the Court, and is now entered upon the Minutes of the Court as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, CHRISTOPHER CHAD BRITTON, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer: We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

Jimmy Muncy
Presiding Juror

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Answer: We, the jury, unanimously find that the answer to this Special Issue is "No".

Jimmy Muncy
Presiding Juror

VERDICT: We, the jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

Jimmy Muncy
Presiding Juror

A presentence investigation report was done according to Article 42.12, sec. 9, CCP.

And thereupon the Court asked the Defendant whether the Defendant had anything to say why said sentence should not be pronounced upon said Defendant, and the Defendant answered nothing in bar thereof. Whereupon the Court proceeded to pronounce sentence upon said Defendant as stated above.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the defendant is guilty of the offense stated above, the punishment is fixed as stated above, and the State of Texas do have and recover of said defendant all court costs in this prosecution expended, for which execution will issue.

It is ORDERED by the Court that the Defendant be taken by the authorized agent of the State of Texas or by the Sheriff of this county and be safely conveyed and delivered to the **Director, Institutional Division-TDCJ**, there to be confined in the manner and for the period aforesaid, and the said defendant is hereby remanded to the custody of the Sheriff of this county until such time as the Sheriff can obey the directions of this sentence.

The defendant is given credit as stated above on this sentence for the time spent in county jail. The Defendant also is ordered to pay restitution to the person(s) named above in the amount specified above.

Furthermore, the following special findings or orders apply:

None.

Signed on the 8th day of August, 2002.



Judge Presiding

Defendant's right thumbprint

FILED
CAROLINE WOODBURN
DISTRICT CLERK

2002 AUG -8 P 4: 04

FOTLER COUNTY, TEXAS

BY _____ DEPUTY



BILL OF COSTS
CRIMINAL

CAUSE NO. 045373-00-B

STYLE: THE STATE OF TEXAS VS CHRISTOPHER CHAD BRITTON

IN AND FOR THE: 181ST DISTRICT COURT

JUDGMENT DATE: AUGUST 8, 2002

TO: TDCJ

| | | |
|--|------|--------|
| CLERK FEE | *\$* | 40.00 |
| FUGITIVE APPREHENSION FUND | | 5.00 |
| JUVENILE JUSTICE CRIME CENTER | | .25 |
| STATE CONSOLIDATED CRIMINAL FEES | | 80.00 |
| CRIME VICTIM COMPENSATION FUND | | 45.00 |
| JUDICIAL/COURT PERSONNEL TRAINING FUND | | 2.00 |
| RECORDS PRESERVATION | | 20.00 |
| COURTHOUSE SECURITY FEE | | 5.00 |
| SHERIFF FEES | | 12.89 |
| ATTORNEY FEES (COURT APPOINTED) | | |
| FINE | | |
| LAW LIBRARY | | |
| JURY FEE | | 20.00 |
| CRIMINAL MANAGEMENT INSTITUTE | | |
| VISUAL RECORD BY ELECTRONIC DEVICE | | |
| APPEAL TRANSCRIPT | | |
| TIME PAYMENT FEE | | |
| GRAFFITI ERADICATION FEE | | |
| TOTAL COSTS | | 230.14 |
| PRIOR PAYMENTS | | |
| BALANCE DUE | | 230.14 |

I HEREBY CERTIFY THE ABOVE TO BE A CORRECT ACCOUNT OF THE FINE AND COSTS
IN THE ABOVE CAPTIONED CAUSE AS SHOWN IN THE RECORDS AS OF AUGUST 8,
2002.

ISSUED AND GIVEN UNDER MY HAND AND SEAL ON AUGUST 8, 2002.

CAROLINE WOODBURN, CLERK OF THE COURT
POTTER COUNTY, TEXAS

BY Crystal Jones DEPUTY

THE STATE OF TEXAS

VS.

CHRISTOPHER CHAD BRITTON

§
§
§
§
§

IN THE 181st DISTRICT COURT

IN AND FOR

POTTER COUNTY, TEXAS

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, CHRISTOPHER CHAD BRITTON, by and through his attorney of record, and files this his Notice of Appeal and would show the Court as follows:

FILED IN
COURT OF CRIMINAL APPEALS

I.

JAN 2 2003

On the 8th day of August, 2002, the Defendant was duly sentenced in the above-styled and numbered cause to death by lethal injection. Appeal in this case is automatic.

II.

The Defendant, by and through his attorney of record, hereby gives written notice of appeal to the Court of Criminal Appeals at Austin, Texas.

Respectfully submitted,


WARREN L. CLARK
ATTORNEY AT LAW
203 W. 8th Ave., Ste. 320
P.O. Box 2408 (79105)
Amarillo, Texas 79101
806/379-7655
806/371-9610 (fax)

Attorney for Defendant
SBN # 04300500

FILED
KATHLEEN WOODBURN
DISTRICT CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was furnished to the office of the Hemphill County District Attorney on this the 17 day of September, 2002.



Warren L. Clark

FILED
CAROLINE WOODBURN
DISTRICT CLERK
2002 SEP 18 A 11:15
HEMPHILL COUNTY, TEXAS
BY _____ DEPUTY

74145
Oral Argument Requested

NO. 74,145

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

JEDIDIAH ISSAC MURPHY,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

On appeal from the 194th Judicial District Court of
Dallas County, Texas
Cause No. F00-02424-NM

FILED IN
COURT OF CRIMINAL APPEALS

DEC 27 2002

STATE'S BRIEF

Troy C. Bennett, Jr., Clerk

Bill Hill
Criminal District Attorney
Dallas County, Texas

Counsel of Record:
Lisa Braxton Smith
Assistant District Attorney
State Bar No. 00787131

Frank Crowley Courthouse
133 N. Industrial Blvd., LB-19
Dallas, Texas 75207-4399
(214) 653-3638
(214) 653-3643 (FAX)

ORIGINAL

INDEX OF AUTHORITIES

CASES

| | |
|--|----------------|
| <i>Adams v. State</i> , 448 U.S. 38 (1980)..... | 11 |
| <i>Banda v. State</i> , 890 S.W.2d 42 (Tex. Crim. App. 1994)..... | 22 |
| <i>Barajas v. State</i> , No. 415-99, 2002 Tex. Crim. App. LEXIS 140 (Tex. Crim. App. June 26, 2002) | 6, 9 |
| <i>Barley v. State</i> , 906 S.W.2d 27 (Tex. Crim. App. 1995)..... | 55 |
| <i>Bone v. State</i> , 77 S.W.3d 828 (Tex. Crim. App. 2002)..... | 32 |
| <i>Boyle v. State</i> , 820 S.W.2d 122 (Tex. Crim. App. 1989)..... | 48 |
| <i>Brewer v. State</i> , 649 S.W.2d 628 (Tex. Crim. App. 1983)..... | 47 |
| <i>Brown v. State</i> , 29 S.W.3d 251 (Tex. App. – Houston [14 th Dist.] 2000, no pet.)..... | 65 |
| <i>Brown v. State</i> , 64 S.W.3d 94 (Tex. App. – Austin 2001, no pet.) | 58, 63 |
| <i>Caldwell v. State</i> , 818 S.W.2d 790 (Tex. Crim. App. 1991)..... | 69 |
| <i>Callins v. Collins</i> , 510 U.S. 1141 (1994)..... | 72 |
| <i>Cantu v. State</i> , 738 S.W.2d 249 (Tex. Crim. App. 1987)..... | 62, 63, 64, 66 |
| <i>Cantu v. State</i> , 842 S.W.2d 667 (Tex. Crim. App. 1992)..... | 69 |

| | |
|--|------------|
| <i>Chamberlain v. State</i> , 998 S.W.2d 230 (Tex. Crim. App. 1999)..... | 70, 72 |
| <i>Cordova v. State</i> , 733 S.W.2d 175 (Tex. Crim. App. 1987)..... | 21 |
| <i>Craig v. State</i> , 985 S.W.2d 693 (Tex. App. – Houston [1 st Dist.] 1999, pet. ref’d) | 60, 66 |
| <i>Cuevas v. State</i> , 742 S.W.2d 331 (Tex. Crim. App. 1987)..... | 24 |
| <i>Curry v. State</i> , 30 S.W.3d 394 (Tex. Crim. App. 2000)..... | 54 |
| <i>Cuttillo v. Cinelli</i> , 485 U.S. 1037 (1988)..... | 41 |
| <i>Davis v. State</i> , 649 S.W.2d 380 (Tex. App. — Fort Worth 1983, pet. ref’d) | 42, 47, 58 |
| <i>Delk v. State</i> , 855 S.W.2d 700 (Tex. Crim. App. 1993)..... | 62, 65 |
| <i>Dickson v. State</i> , 492 S.W.2d 267 (Tex. Crim. App. 1973)..... | 58 |
| <i>Drew v. State</i> , 743 S.W.2d 207 (Tex. Crim. App. 1987)..... | 13 |
| <i>Ex parte Watson</i> , 601 S.W.2d 350 (Tex. Crim. App. 1980)..... | 51 |
| <i>Feldman v. State</i> , 71 S.W.3d 738 (Tex. Crim. App. 2002)..... | passim |
| <i>Fuller v. State</i> , 829 S.W.2d 191 (Tex. Crim. App. 1992)..... | 13 |
| <i>Gill v. State</i> , 646 S.W.2d 532 (Tex. App. – Houston [1 st Dist.] 1982, no pet.) | 52 |
| <i>Green v. State</i> , 912 S.W.2d 189 (Tex. Crim. App. 1995)..... | 68, 69 |

| | |
|---|----------------|
| <i>Hardin v. State</i> , 951 S.W.2d 208 (Tex. Crim. App. 1997)..... | 32 |
| <i>Hignite v. State</i> , 522 S.W.2d 210 (Tex. Crim. App. 1975)..... | 50, 51, 53, 54 |
| <i>Hughes v. State</i> , 24 S.W.3d 833 (Tex. Crim. App. 2000)..... | 16 |
| <i>Hughes v. State</i> , 878 S.W.2d 142 (Tex. Crim. App. 1995)..... | 23, 26, 31 |
| <i>Ibarra v. State</i> , 11 S.W.3d 189 (Tex. Crim. App. 1999)..... | 63 |
| <i>Jackson v. State</i> , 33 S.W.3d 828 (Tex. Crim. App. 2000)..... | 7, 70 |
| <i>Jackson v. State</i> , 826 S.W.2d 751 (Tex. App. – Houston [14 th Dist.] 1992, pet. ref’d) | 18, 67 |
| <i>Jackson v. State</i> , 992 S.W.2d 469 (Tex. Crim. App. 1999)..... | 67 |
| <i>Janecka v. State</i> , 739 S.W.2d 813 (Tex. Crim. App. 1987)..... | 17 |
| <i>Jones v. State</i> , 982 S.W.2d 386 (Tex. Crim. App. 1998)..... | 14, 18 |
| <i>Jones v. United States</i> , 144 L.Ed.2d 370 (1999) | 70 |
| <i>Jurek v. State</i> , 428 U.S. 262 (1976)..... | 69 |
| <i>King v. State</i> , 29 S.W.3d 556 (Tex. Crim. App. 2000)..... | 10, 13 |
| <i>Ladd v. State</i> , 3 S.W.3d 547 (Tex. Crim. App. 1999)..... | 8 |
| <i>Larrabee v. State</i> , 746 S.W.2d 264 (Tex. App. – Amarillo 1988, pet. ref’d)..... | 52 |

| | |
|--|------------|
| <i>Lawton v. State</i> , 913 S.W.2d 542 (Tex. Crim. App. 1995)..... | 71 |
| <i>Loserth v. State</i> , 963 S.W.2d 770 (Tex. Crim. App. 1998)..... | 60 |
| <i>Malik v. State</i> , 953 S.W.2d 234 (Tex. Crim. App. 1997)..... | 54 |
| <i>Mastrian v. McManus</i> , 554 F.2d 813 (8 th Cir. 1977)..... | 41 |
| <i>McCoy v. State</i> , 996 S.W.2d 899 (Tex. App. – Houston [14 th Dist.] 1999, pet. ref'd) | 37, 38 |
| <i>Mills v. Maryland</i> , 486 U.S. 367 (1988)..... | 70 |
| <i>Mosley v. State</i> , 983 S.W.2d 249 (Tex. Crim. App. 1998)..... | 7, 67 |
| <i>Neil v. Biggers</i> , 409 U.S. 188 (1972)..... | 55, 60 |
| <i>Nonn v. State</i> , 13 S.W.3d 434 (Tex. App. – Corpus Christi 2000), <i>vacated on other grounds</i> , 41 S.W.3d 677 (Tex. Crim. App. 2001) | 38 |
| <i>Ott v. State</i> , 627 S.W.2d 218 (Tex. App. – Fort Worth 1981, pet. ref'd) | 47 |
| <i>Patrick v. State</i> , 906 S.W.2d 481 (Tex. Crim. App. 1996)..... | 18, 26 |
| <i>Perez v. State</i> , 41 S.W.3d 712 (Tex. App. – Corpus Christi 2001, pet. ref'd)..... | 57 |
| <i>Raby v. State</i> , 970 S.W.2d 1 (Tex. Crim. App. 1998)..... | 8 |
| <i>Rachal v. State</i> , 917 S.W.2d 799 (Tex. Crim. App. 1996)..... | 10, 11, 13 |
| <i>Rocha v. State</i> , 16 S.W.3d 1 (Tex. Crim. App. 2000)..... | 16 |

| | |
|---|--------|
| <i>Rogers v. State</i> , 774 S.W.2d 247 (Tex. Crim. App. 1989)..... | 59, 66 |
| <i>Rousseau v. State</i> , 855 S.W.2d 666 (Tex. Crim. App. 1993)..... | 71 |
| <i>Roy v. State</i> , 891 S.W.2d 315 (Tex. App. – Fort Worth 1994, no pet.)..... | 21 |
| <i>Simmons v. United States</i> , 390 U.S. 377 (1968)..... | 55, 60 |
| <i>Standefer v. State</i> , 59 S.W.3d 177 (Tex. Crim. App. 2001)..... | 6, 8 |
| <i>State ex rel. Curry v. Carr</i> , 847 S.W.2d 561 (Tex. Crim. App. 1992)..... | 17 |
| <i>State ex rel. Turner v. McDonald</i> , 676 S.W.2d 371 (Tex. Crim. App. 1981)..... | 17 |
| <i>Stewart v. State</i> , 44 S.W.3d 582 (Tex. Crim. App. 2001)..... | 49, 50 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... | 32 |
| <i>Turner v. State</i> , No. 73,559, 2002 Tex. Crim. App. LEXIS 153 (Tex. Crim. App. Sept. 11, 2002)..... | 72 |
| <i>United States v. Briggs</i> , 698 F.2d 486 (D.C. Cir. 1983)..... | 41 |
| <i>United States v. Dien</i> , 609 F.2d 1038 (2 nd Cir. 1979)..... | 41 |
| <i>United States v. Irwin</i> , 612 F.2d 1182 (9 th Cir. 1980)..... | 41 |
| <i>United States v. Kilrain</i> , 566 F.2d 979 (5 th Cir. 1978)..... | 42 |
| <i>United States v. Levy</i> , 577 F.2d 200 (3 rd Cir. 1979)..... | 41 |

| | |
|---|--------|
| <i>United States v. Mastroianni</i> , 749 F.2d 900 (1 st Cir. 1984)..... | 41 |
| <i>United States v. Melvin</i> , 650 F.2d 641 (5 th Cir. 1981)..... | 42 |
| <i>United States v. Morrison</i> , 449 U.S. 361 (1981)..... | 41 |
| <i>United States v. Sander</i> , 615 F.2d 215 (5 th Cir. 1980)..... | 42 |
| <i>United States v. Steele</i> , 727 F.2d 580 (6 th Cir. 1984)..... | 41 |
| <i>Ward v. State</i> , 474 S.W.2d 471 (Tex. Crim. App. 1971)..... | 58 |
| <i>Washburn v. State</i> , 692 S.W.2d 576 (Tex. App. – Houston [1 st Dist.] 1985, no pet.) | 52, 53 |
| <i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977)..... | 41, 42 |
| <i>Webb v. State</i> , 760 S.W.2d 263 (Tex. Crim. App. 1988)..... | 65 |
| <i>Whitley v. State</i> , 635 S.W.2d 791 (Tex. App. – Tyler 1982, no pet.) | 50 |
| <i>Williams v. State</i> , 773 S.W.2d 525 (Tex. Crim. App. 1988)..... | 22 |
| <i>Williams v. State</i> , 937 S.W.2d 479 (Tex. Crim. App. 1996)..... | 70 |
| <i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)..... | 10 |
| <i>Zarychta v. State</i> , 44 S.W.3d 155 (Tex. App. – Houston [14 th Dist.] 2001, pet. ref'd), cert. denied, 122 S.Ct. 2312 (2002) | 57 |

STATUTES

| | |
|--|----------------|
| TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon Supp. 2002) | 17 |
| TEX. CODE CRIM. PROC. ANN. art. 13.07 (Vernon 1977)..... | 48, 50 |
| TEX. CODE CRIM. PROC. ANN. art. 13.08 (Vernon 1977)..... | 49 |
| TEX. CODE CRIM. PROC. ANN. art. 13.12 (Vernon 1977)..... | 49, 50 |
| TEX. CODE CRIM. PROC. ANN. art. 13.17 (Vernon 1977)..... | 48 |
| TEX. CODE CRIM. PROC. ANN. art. 13.18 (Vernon 1977)..... | 49 |
| TEX. CODE CRIM. PROC. ANN. art. 13.19 (Vernon 1977)..... | 49, 54 |
| TEX. CODE CRIM. PROC. ANN. art. 35.13 (Vernon 1989)..... | 16, 17 |
| TEX. CODE CRIM. PROC. ANN. art. 35.15 (Vernon Supp. 2002) | 17 |
| TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1989 & Supp. 2002) | 10, 15, 18, 19 |
| TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981)..... | 49 |
| TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 2002) | 68, 69, 70 |
| TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979)..... | 39 |
| TEX. PENAL CODE ANN. § 19.03 (Vernon 1994)..... | 68 |

OTHER AUTHORITIES

| | |
|---------------------------------|------------|
| TEX. CONST., art. I, § 10 | 6, 15 |
| U.S. CONST. amend. V | 15, 55 |
| U.S. CONST. amend. VI..... | 6, 10, 68 |
| U.S. CONST. amend. VIII | 67, 68, 69 |
| U.S. CONST. amend. XIV | passim |

The State of Texas submits this brief to the Honorable Court of Appeals in reply to the brief of appellant, Jedidiah Issac Murphy.

STATEMENT OF THE CASE

A jury convicted appellant of capital murder and, pursuant to the jury's answers to the special punishment issues, the trial court sentenced him to death. (CR: 215).

STATEMENT OF FACTS

Appellant kidnapped, robbed, and murdered eighty-year-old Bertie Cunningham. Ms. Cunningham went shopping at Collin Creek Mall in Plano and was returning to her home in Garland when taken hostage by appellant. Ultimately, appellant forced Ms. Cunningham into the trunk of her car and shot her in the head. (RR47: 23-31, 44-47; RR49: 42-44).

Immediately afterwards, appellant repeatedly attempted to withdraw money from Ms. Cunningham's bank account using her ATM card. These attempts failed, but over the next two days, appellant successfully used Ms. Cunningham's credit cards¹ at various locations. (RR47: 150-52, 156-61).

Shortly after shooting Ms. Cunningham, appellant picked up his niece and two of her teenage friends, driving them around in Ms. Cunningham's car with Ms. Cunningham

¹ Appellant also stole a credit card belonging to Ms. Cunningham's sister. Ms. Cunningham used her sister's credit card to purchase a bathrobe for her sister. (RR47: 28).

in the trunk. He bought some beer for himself, then he purchased himself and the two teenage boys motorized scooters from a Richardson sporting goods store. (RR47: 89-99). The next day, appellant drove to Van Zandt County to visit his childhood friend Treshod Tarrant, and bought dinner, beer, and liquor. The police discovered appellant at Shod's grandmother's house early the next morning and arrested him. (RR47: 202-211, 242-48; RR48: 78-80).

Upon his arrest, appellant admitted that Ms. Cunningham's body was located in a nearby creek. (RR48: 84-90). He also subsequently executed a written statement to the police in which he claimed he accidentally shot Ms. Cunningham while forcing her into the trunk. (RR48: 175-84; State's Exhibit 47).

SUMMARY OF ARGUMENT

Points 1 & 2: Limitation of Appellant's Questioning of Venirepersons: The trial court did not abuse its discretion in preventing appellant from asking the prospective jurors (1) "Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?" and (2) "Would you promise the Court that you would not do so?" The questions sought to improperly discern what effect evidence of Bertie Cunningham's good character would have on a prospective juror's assessment of appellant's punishment. Furthermore, the questions were merely "a license to go fishing" for facts that would prevent a prospective juror from assessing life.

Points 3 & 4: Granting State's Challenges for Cause: The trial court properly granted the State's challenge for cause against venireperson Alena Treat. Ms. Treat

indicated that she would only consider the death penalty for those capital murderers who would likely murder again. Thus, Ms. Treat possessed a bias against the law the State was entitled to rely upon. In any event, appellant demonstrated no deprivation of his right to a fair and impartial jury; nor did he demonstrate that Ms. Treat was excluded because of any general opposition to the death penalty. Therefore, error, if any, in excluding Ms. Treat was harmless.

Points 5-8: Denial of Appellant's Challenges for Cause: Appellant did not preserve his complaint regarding the denial of these challenges for cause because he belatedly requested additional peremptory strikes. Nevertheless, the trial court did not abuse its discretion in denying appellant's challenges for cause against venirepersons Phillip May, John Robuck, Thomas Brooks, and Kimberly Williams. Each of these venirepersons indicated a bias against the law applicable to the case. Furthermore, the additional strikes granted appellant at the outset of voir dire were sufficient to cure any error.

Point 9: Effective Assistance of Counsel: Appellant's attack on defense counsel's voir dire performance is unsubstantiated. The record supports the presumption that counsel's decision to peremptorily strike venirepersons Mark Colditz and John Wilson constituted reasonable trial strategy. Furthermore, appellant fails to demonstrate that, but for counsel striking Mr. Colditz and Mr. Wilson, the result of the proceeding would have been different.

Point 10: Request for Abatement: The request to abate is moot. This Court abated the appeal for the requested fact findings regarding the admissibility of appellant's

written and oral statements to the police. The trial court has prepared the ordered findings and forwarded them to this Court. Appellant filed no supplemental brief related to those findings.

Point 11: Attorney-Client Privilege: Appellant's constitutional right to counsel was not violated by the fact that the prosecutor saw three pages of confidential communications written by appellant to his attorney. Appellant made no showing of how the State used any of the information in these three pages. Furthermore, the record supports the prosecutor's testimony that he obtained no useful information from those pages. Thus, the record supports the trial court's conclusion that this intrusion did not injure appellant or benefit the State.

Point 12: Proof of Venue: The evidence is sufficient to prove by a preponderance of the evidence that venue for this capital murder lay in Dallas County. The evidence shows that Ms. Cunningham was abducted, injured, and died in Dallas County, that appellant removed property he stole from Ms. Cunningham to Dallas County, and that appellant lived in Dallas County at the time of the murder. Even if the court should only have instructed the jury in accordance with the homicide venue statute, the evidence supports a finding of venue in Dallas County. Thus, under *Malik*, the evidence is still sufficient to prove venue.

Point 13: Admissibility of Identification Testimony: The totality of the circumstances surrounding Sheryl Wilhelm's identification of appellant show that the lineup viewed by Ms. Wilhelm was not impermissibly suggestive and that, even if so, her

identification of him was nonetheless reliable. Therefore, the trial court properly admitted evidence of this out-of-court identification of appellant.

Point 14: Denial of Extraneous Offense Instruction: Extraneous offense evidence has relevance beyond appellant's future dangerousness. Therefore, the trial court properly refused to limit the jury's consideration of extraneous offense evidence to the future dangerousness issue.

Point 15: Denial of Instructions Defining Special Issue Terms: The trial court had no duty to submit instructions defining the terms "probability," "criminal acts of violence," and "continuing threat to society." As repeatedly held by this Court, these terms are understood by their common meaning and require no special definition.

Point 16: Constitutionality of 12/10 Rule: This Court has repeatedly held that the death penalty statute's "12/10" rule (which requires at least ten "no" votes for the jury to return a negative answer to special issues one and two, and at least ten "yes" votes for the jury to return an affirmative answer to the mitigation special issue) does not violate the federal or statute constitutions.

Points 17 & 18: Constitutionality of Texas Death Penalty Scheme: Appellant's assertion that there is an irreconcilable tension between the constitutional requirements of eliminating caprice from the imposition of the death penalty and of allowing each juror a reasoned, moral response to the evidence, has been repeatedly rejected by this Court.

Points 19 & 20: Cumulative Constitutional Error: A cumulative-error analysis aggregates only actual errors to determine their cumulative effect. Because there is no

error in this case and because the alleged types of error have no synergistic effect, appellant's cumulative-error allegation is without merit.

ARGUMENT

POINTS 1 & 2: Limiting Appellant's Questioning of Jury Panel

Appellant contends the trial court violated his federal and state constitutional rights to interrogate and challenge members of the jury panel by prohibiting him from asking: (1) "Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?" and (2) "Would you promise the Court that you would not do so?" (RR5: 8-9). See U.S. CONST. amend VI; TEX. CONST., art. I, § 10. This restriction on appellant's voir dire of the jury panel was not unconstitutional or otherwise improper.

Appellant's constitutional right to question the panel is not unlimited. The trial court possesses broad discretion over the jury selection process. Thus, the court's decision to limit questioning of the panel will not be disturbed absent an abuse of discretion. The court abuses its discretion only when it prohibits a question about a proper area of inquiry. Questions that seek to discover a potential juror's view on an issue applicable to the case are proper so long as (1) they do not improperly commit the potential juror to a particular verdict based on particular facts, and (2) they are not so vague or broad as to constitute a "global fishing expedition." *Barajas v. State*, No. 415-99, 2002 Tex. Crim. App. LEXIS 140, at *4 (Tex. Crim. App. June 26, 2002); *Standefer v. State*, 59 S.W.3d 177, 182-83 (Tex. Crim. App. 2001).

Appellant argues that his questions were proper because they did not seek a commitment from the prospective jurors on the basis of any particular fact. He claims his questions sought only to determine if the prospective jurors could follow the law, namely, hold the State to its burden of proving appellant's future dangerousness. The reference in appellant's questions to the State's burden of proof is nothing but a smokescreen for an improper commitment question. Closer examination reveals the true intent of appellant's inquiry was to discern what effect evidence of Bertie Cunningham's good character would have on a prospective juror's assessment of appellant's punishment.

Appellant's contention that he was merely looking for jurors who could follow the law is inherently suspect. His inquiry was based on a false premise, namely, that evidence of Ms. Cunningham's character bore some relation to the future dangerousness issue; it bore none. A victim's character is relevant to the issue of a defendant's future dangerousness only to the extent that the defendant knew of his victim's character at the time of the offense. *See Jackson v. State*, 33 S.W.3d 828, 833-34 (Tex. Crim. App. 2000) (citing *Mosley v. State*, 983 S.W.2d 249, 261 n.16 (Tex. Crim. App. 1998)). Ms. Cunningham and appellant were strangers, and there was no evidence that appellant knew anything about her character as a person when he killed her.

On the other hand, evidence of Ms. Cunningham's good character was patently relevant to the mitigation special issue. *See Mosley*, 983 S.W.2d at 263 (holding "victim-related evidence" relevant to show that mitigating circumstances not 'sufficient' to warrant imposing a life sentence). Appellant had an interest in eliminating those prospective jurors who would consider evidence of Ms. Cunningham's good character as

weighing heavily against imposing a life sentence. In answering appellant's first question, the prospective jurors would be identifying themselves as jurors who would either favorably or unfavorably view victim character evidence. Thus, they would be committing themselves to treating victim character evidence in a particular way. *See Standefer*, 59 S.W.3d at 179 (commitment questions include questions that ask the prospective juror to set the hypothetical parameters for his decision making).

A commitment question is proper only if it would lead to a valid challenge for cause. *Standefer*, 59 S.W.3d at 182. The manner in which a prospective juror might characterize or use victim character evidence in assessing punishment would never subject him to a challenge for cause. The State has no burden of proof on the mitigation issue. *See Ladd v. State*, 3 S.W.3d 547, 559 (Tex. Crim. App. 1999). Moreover, the law does not require a juror to treat any particular type of evidence as mitigating. *Raby v. State*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998). In fact, it precludes any inquiry into how a prospective juror would characterize or weigh a particular piece of evidence at punishment. *See id.* (holding trial court properly refused to allow defendant to ask prospective jurors what types of evidence they would find mitigating). Thus, the commitment appellant's questions sought was improper. *See Standefer*, 59 S.W.3d at 182 ("victim impact evidence is a legitimate factor for a jury to consider in deciding whether to impose a life sentence instead of death (i.e. in answering the mitigation special issue), and a prospective juror cannot be asked whether such evidence would affect his resolution of that issue").

The trial court could also have reasonably concluded that appellant's queries would foster too broad a field of questioning. The question, "Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?" could be repeated to include numerous other facts in a given case. For instance, in appellant's case, the question could be amended to ask if the victim's age, health, occupation, or associations with certain people would cause the prospective jurors to reduce the State's burden of proof. A line of questioning based on this "burden of proof" qualifier would be nothing but "a license to go fishing" for facts that would prevent a prospective juror from assessing life. *Compare with Barajas*, 2001 Tex. Crim. App. 140, at *11-12 (holding trial court acted within its discretion in prohibiting defendant from asking prospective jurors whether they "could be fair and impartial" under a given set of facts because question was not sufficiently tailored to any relevant issue in the case and constituted "a global fishing expedition").

In sum, appellant's questions improperly sought to commit prospective jurors to treating victim character evidence in a particular manner. Also, appellant's questions created the danger of unfettered exploration of the prospective juror's views regarding particular punishment evidence. Thus, the court's refusal to permit appellant's inquiry into victim character evidence was a justified limitation of appellant's voir dire of the jury panel.

POINTS 3 & 4: Granting State's Challenge for Cause

Appellant contends the trial court erroneously granted the State's challenge for cause against venireperson Alena Treat. The court agreed with the State that Ms. Treat was biased against the law because, in answering the future dangerousness special issue, she would consider only future murders or attempted murders as "criminal acts of violence that would constitute a continuing threat to society." (RR12: 50-52). Appellant argues Ms. Treat's exclusion violated article 35.16 of the criminal procedure code and his federal constitutional right to due process. *See* U.S. CONST. amends VI & XIV; TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon Supp. 2002). Appellant insists Ms. Treat had no bias against the law and maintains that she was excused merely for her general opposition to the death penalty. Appellant is wrong.

Veniremember Properly Excused

The court's decision to excuse a venireperson for cause is given great deference and will be reversed only for abuse of discretion. If the totality of the voir dire testimony supports the trial court's finding that the venireperson is unable to follow the law, as instructed, then the court's decision to excuse that venireperson will be upheld. *King v. State*, 29 S.W.3d 556, 568 (Tex. Crim. App. 2000).

A venireperson may not be excused for her general opposition to the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968); *Rachal v. State*, 917 S.W.2d 799, 810 (Tex. Crim. App. 1996). But a venireperson may be excused based on her views about the death penalty if those views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Adams v. State, 448 U.S. 38, 45 (1980); *Rachal*, 917 S.W.2d at 810; *see also* TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3) (Vernon Supp. 2002) (authorizing State's challenge for cause based on venireperson's "bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment").

Ms. Treat demonstrated no general opposition to the death penalty. When the prosecutor asked her how she felt about participating in a trial in which her verdict might result in a death sentence, Ms. Treat said:

Well, as far as the death penalty is concerned, I don't like there being a death penalty, but I also do not see that there's any logical alternative. So I would not have a problem adhering to the letter of the law. It seems like one of those necessary kind of things. I'm not an active proponent, but like I said, I don't see an alternative at this point.

She also stated that she believed we needed the death penalty to "protect society." (RR12: 12).

The remainder of Ms. Treat's voir dire reflects, however, that she held a bias against the law governing a defendant's eligibility for the death penalty. Ms. Treat stated that, in answering the future dangerousness special issue, she interpreted the term "criminal acts of violence" to mean a murder or attempted murder. (RR12: 15, 44-45). At one point, she acknowledged that mentally disabling someone for life would be a criminal act of violence. (RR12: 46). Ultimately, she even conceded that rape, armed robbery, and aggravated assault with a deadly weapon "could be" criminal acts of violence. (RR12: 47-49). But while acknowledging that crimes such as rape, armed robbery, etc., could be criminal acts of violence, she declared that only some of those offenses constituted "a continuing threat to society." (RR12: 49). Moreover, she

remained insistent throughout her voir dire that, in her mind, only those crimes so extremely violent that a person's life was put in danger constituted a criminal act of violence. (RR12: 17, 46).

In fact, she told the prosecutor that she would not answer the future dangerousness issue affirmatively unless the State showed her that the defendant was at least likely to attempt a murder in the future:

[PROSECUTOR]: . . . [W]ell, let me just ask you, when answering Special Issue Number 1 then, is the State – is the State going to have [sic] show to you that there's a probability this man would commit a future murder in order for you to answer Special Issue Number 1 yes? Is that what you're saying to me or not?

[TREAT]: I'm saying that the State would have – in my mind would have to prove that the person would be likely to at least continue to attempt the same kind of thing, whether he – well, I guess in this case he would succeed or not is not the issue.

(RR12: 16).

Ms. Treat never retreated from this remark. Indeed, she reaffirmed it, stating that without some evidence that the defendant would commit murder again, she would answer the special issues in a manner that would result in a life sentence:

[TREAT]: . . . What I'm trying to say is that I know that there is a different way of thinking on [special issue] Number 1 and Number 2, but if a person's character or the circumstances seemed to indicate that the same kind of scenario would not occur again, then I would have to answer that in such a way that it would be a life sentence.

(RR12: 19).

Appellant argues that these responses evince no bias against the law. But the law does not reserve capital punishment only for those who will likely murder again. *Drew v.*

State, 743 S.W.2d 207, 211 (Tex. Crim. App. 1987). Factors other than those prescribed by law may not be made absolute prerequisites for imposition of the death penalty. *Fuller v. State*, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992) (citing *Drew*). A juror must be able to set aside her personal preferences and biases to consider as death eligible all those defined as death eligible by section 19.03 of the penal code and article 37.071 of the criminal procedure code. *Rachal*, 917 S.W.2d at 812.

Jurors may believe what they want regarding the quantum of evidence necessary to impose death and the weight to give particular evidence, but they may not foreclose completely, through some personal bias, consideration of any evidence adduced at trial. *Rachal*, 917 S.W.2d at 812-13. If a potential juror states that she can never affirmatively answer an issue unless specific evidence she requires is introduced, then she has foreclosed consideration of other evidence of future dangerousness and, thus, her view conflicts with the law. *Id.* at 813 n.11.

By refusing to answer the special issues in a manner warranting a death sentence absent some evidence that appellant would probably commit or attempt to commit another murder, Ms. Treat categorically foreclosed her consideration of other future dangerousness evidence. Thus, Ms. Treat evinced a bias against the law that rendered her challengeable for cause. To the extent, if any, that some of Ms. Treat's other remarks could be interpreted as retreating from this expressed bias, the trial court was the fact finder during voir dire and, thus, free to resolve her conflicting answers in the State's favor. *See King*, 29 S.W.3d at 568 (particular deference is given to the trial court's conclusion that venireperson cannot follow law when venireperson's answers are

vacillating, unclear, or contradictory). To conclude otherwise would controvert this Court's policy of encouraging trial court's to liberally grant challenges for cause rather than err by denying a challenge on a close question. *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998).

Any Error Harmless

Even assuming Ms. Treat's excusal was erroneous, it was harmless. The erroneous excusal of a venireperson warrants reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury. *Jones*, 982 S.W.2d at 393. Appellant makes no such showing. Ms. Treat was not challenged nor subsequently excused for her general opposition to the death penalty but because of her perceived bias against law on which the State was entitled to rely. (RR12: 12, 50-53). Also, appellant neither argues nor demonstrates that any venireperson who served on the jury was unfit for duty. Thus, reversal is unwarranted. *See Feldman v. State*, 71 S.W.3d 738, 749 (Tex. Crim. App. 2002) (holding any error in excusing venireperson was harmless absent any showing that she was excused based on general opposition to death penalty or that any juror was unfit for jury duty).

POINTS 5-8: Denial of Appellant's Challenges for Cause

Appellant contends the trial court erroneously denied his challenges for cause against venirepersons Phillip May, John Robuck, Thomas Brooks, and Kimberly Williams. He argues that the denial of these four challenges for cause violated his federal and state constitutional rights to due process and article 35.16 of the criminal procedure

code. U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) & (c)(3) (Vernon 1989 & Supp. 2002).

Appellant failed to preserve his complaint for review. Nevertheless, the trial court properly denied appellant's challenges against these four venirepersons. Furthermore, error, if any, was harmless.

Complaint Not Preserved

In order to preserve this complaint for appellate review, appellant had to demonstrate that: (1) he clearly and specifically challenged the complained-of venirepersons, (2) he peremptorily struck them, (3) he exhausted all his peremptory strikes, (4) the court denied his request for additional strikes, and (5) an objectionable juror sat on the jury. *Feldman*, 71 S.W.3d at 744. Appellant fails to preserve his complaint because he did not make the requisite request for additional strikes.

Appellant clearly and specifically challenged for cause Mr. May, Mr. Robuck, Mr. Brooks, and Ms. Williams. Then, after all challenges for cause were exercised by both sides, he peremptorily struck these four venirepersons. (RR17: 117; RR18: 63-65; RR28: 53-54; RR37: 188; RR44: 5, 8-10). Appellant subsequently exhausted all his peremptory challenges, including three extra peremptory strikes given to him by the court at the outset of voir dire. (RR4: 3; RR44: 12). Thereafter, appellant accepted the twelfth juror without first requesting any additional strikes. (RR44: 12-13).

Eventually, appellant did ask for two more strikes in addition to the eighteen he had been given. At this point, however, appellant had accepted all twelve jurors without complaint. (RR44: 13-14). In retrospect, appellant claimed two jurors, Richard

Bachmeyer (Juror No. 5) and Robert Mendro (Juror No. 6), were objectionable.² Yet appellant voluntarily accepted both men when he still had numerous peremptory strikes available to exercise.³ (RR44: 6-7). Thus, these two jurors were not forced on appellant because the court denied his request for two additional strikes.

Furthermore, appellant did not simply request more strikes; he asked to retroactively apply them. The court could not legally grant this request. Article 35.13 prescribes the procedure for exercising challenges, both for cause and peremptory, in a capital case. Under this statute, a juror must be passed for acceptance or challenge first to the State and then to the defendant. TEX. CODE CRIM. PROC. ANN. art. 35.13 (Vernon 1989). The trial court may, as it did in this case, delay both parties' exercise of peremptory strikes until all challenges for cause have been made. (RR44: 2-15). Either method complies with article 35.13.⁴ *Hughes v. State*, 24 S.W.3d 833, 841 (Tex. Crim. App. 2000).

Granting appellant's request to retroactively peremptorily strike Mr. Bachmeyer and Dr. Mendro would have violated article 35.13. *See Rocha v. State*, 16 S.W.3d 1, 6 (Tex. Crim. App. 2000) (trial court properly refused to grant defendant's request to

² Appellant did not identify why these two jurors were objectionable, and he challenged neither for cause. (RR22: 142; RR25: 46).

³ Appellant had exercised only five of his eighteen peremptory strikes when he accepted Mr. Bachmeyer, and he had exercised only six of his eighteen strikes when he accepted Dr. Mendro. (RR44: 6-7).

⁴ The trial court conducted voir dire in this manner at the request of appellant and over the State's objection. (CR1: 139-40; CR2: 420-22; RR4: 4-8; RR5: 5).

retroactively exercise a peremptory challenge in accordance with article 35.13). Under the procedure mandated by article 35.13, a defendant must exercise peremptory strikes upon the examination of individual prospective jurors without the opportunity to evaluate the panel as a group. *Janecka v. State*, 739 S.W.2d 813, 833 (Tex. Crim. App. 1987). Allowing appellant to retroactively strike two venirepersons after twelve jurors had been selected would, in essence, provide him with the opportunity article 35.13 prohibits, to evaluate the panel as a group before the exercise of a strike.

Furthermore, it would infringe on the State's right to intelligently exercise its own strikes. The legislature afforded both the defendant and the State the right to exercise peremptory challenges. TEX. CODE CRIM. PROC. ANN. art. 35.15 (Vernon Supp. 2002). While the procedure article 35.13 provides for exercising those challenges was designed to inure to the defendant's benefit, the legislature could not have intended that the State be precluded from employing any strategy in the exercise of its own challenges.

Indeed, the State is, itself, entitled to a jury trial. *See* TEX. CODE CRIM. PROC. ANN. art. 1.13 (Vernon Supp. 2002); *State ex rel. Curry v. Carr*, 847 S.W.2d 561, 562 (Tex. Crim. App. 1992) (citing *State ex rel. Turner v. McDonald*, 676 S.W.2d 371, 373-74 (Tex. Crim. App. 1981)). Even though not constitutionally founded, that entitlement would be meaningless absent a fairly selected jury. Allowing the defendant to go back to exercise strikes against previously accepted jurors, after the State had exhausted its own strikes, would nullify what strategy the State had employed earlier in the selection process. Such an inequity would surely infringe on the State's right to a fairly selected jury. *Cf. Jackson v. State*, 826 S.W.2d 751, 752 (Tex. App. – Houston [14th Dist.] 1992,

pet. ref'd) (holding it would be inequitable to allow defendant, making an unsupported claim of mistake, to change peremptory strikes after learning which venirepersons were struck by State).

Thus, although appellant purportedly requested two additional strikes to correct the trial court's "error" in denying his challenges for cause, appellant made no request for extra peremptory strikes that could have been legally executed. Consequently, he fails to preserve error, if any, in the denial of his challenges for cause.

Defense Challenges for Cause Properly Denied

Even if properly presented for this Court's review, the trial court did not erroneously deny any of the complained-of challenges for cause.

The trial court's decision to grant or deny a challenge for cause is reviewed for abuse of discretion. The reviewing court looks at the entire record to determine if there is sufficient evidence to support the court's ruling. *Feldman*, 71 S.W.3d at 744 (citing *Patrick v. State*, 906 S.W.2d 481, 488 (Tex. Crim. App. 1996)).

Appellant may challenge any venireperson who demonstrates a bias or prejudice against any phase of the law upon which he is entitled to rely. *See* TEX. CODE CRIM. PROC. 35.16(c)(2). But a challenged venireperson must be excused only if the bias or prejudice would substantially impair his ability to carry out his oath and instructions in accordance with the law. *Feldman*, 71 S.W.3d at 744. Furthermore, the law must be explained to the venireperson before he may be asked whether he can follow that law regardless of his personal views. *Id.* (citing *Jones*, 982 S.W.2d at 390).

(1) Phillip May

Appellant contends the court should have excluded Mr. May for cause because he would follow his religious beliefs over the law. Appellant is entitled to challenge for cause any venireperson who has a bias against any of the law applicable to the case upon which the defense is entitled to rely . . .” TEX. CODE CRIM. PROC. art. 35.16(c)(2). However, appellant never established Mr. May’s “religious” bias against any particular, applicable law upon which the defense was entitled to rely.

Throughout the entirety of his voir dire, Mr. May maintained that his responsibility as a juror to assess a death sentence, if appropriate, did not conflict with his religious beliefs. When the prosecutor asked Mr. May how he felt about the death penalty, Mr. May said:

My personal convictions, it is the right of the State to put somebody to death. It’s the responsibility of the State to keep order and peace over society. As far as myself as a person, it’s improper for me to do that, but working with the State in carrying out their responsibilities, that’s an appropriate time.

(RR17: 72).

When the prosecutor asked Mr. May if he was the type of person who could personally take part in assessing a death sentence, Mr. May replied:

. . . [W]hen I say I feel as a part of a jury that that would be my responsibility to decide. As an individual, it’s never my responsibility to decide whether a person should live or die, take the matters in my own hands. But as a part of the jury, I think that would be my responsibility, and I feel I could do that.

(RR17: 73).

Mr. May also repeatedly stated that, if the evidence supported it, he could answer the special issues so that a death sentence was assessed. (RR17: 74, 84, 92). Moreover, he insisted that, “. . . I have not come here with any set beliefs about the case one way or the other and I’m open to trying to do what I believe is appropriate and right under the law.” (RR17: 93-94).

Thereafter, defense counsel unsuccessfully tried to elicit some conflict between Mr. May’s religious beliefs and the law applicable to this case. At the outset, Mr. May told defense counsel that his church had no policy against the death penalty. (RR17: 97). Undeterred, defense counsel asked Mr. May what he would do if “man’s law” conflicted with “God’s law.” Defense counsel never identified to what particular “law of man” he was referring. Mr. May explained, however, that there was no conflict between the two regarding the death penalty. (RR17: 99-100).

Apparently unsatisfied with Mr. May’s reply, defense counsel again asked him what he would do if forced to choose between some unidentified law and “God’s law.” Unable to discern what conflict defense counsel could be referring to, Mr. May replied, “Okay. I don’t – in this instance I don’t see how it would conflict with my religious beliefs. But I mean, if it did, then I would stand with my religious beliefs . . .” (RR17: 100-01). Defense counsel then asked Mr. May the same vague question again and, once again, Mr. May replied that if he “felt like that would occur,” he would follow his religious beliefs. (RR17: 101).

This concession notwithstanding, Mr. May had stated no conflict with any particular law. *Compare with Roy v. State*, 891 S.W.2d 315, 326-27 (Tex. App. – Fort

Worth 1994, no pet.) (venireperson who unambiguously stated her religious opposition to death penalty demonstrated bias against law upon which State entitled to rely and, thus, court properly excluded her for cause). Moreover, Mr. May affirmed his ability to follow numerous laws upon which appellant was entitled to rely.

Mr. May told defense counsel that he could consider the five-year minimum punishment for the lesser-included offense of murder. (RR17: 108-09). He also said that he could acquit appellant if the State failed to meet its burden of proving any one of the requisite elements of the charged offense, even venue. (RR17: 114). Moreover, he assured defense counsel that he could disregard an involuntary confession, and he promised the trial court that he would consider and evaluate any mitigating evidence. (RR17: 67-68, 115).

Overall, Mr. May appeared to be a religious man, but he gave no indication that his beliefs would prevent or impair his ability to follow the law or his oath in this case. Consequently, the trial court acted well within its discretion when it concluded that Mr. May held no bias that warranted his exclusion. *Cf. Cordova v. State*, 733 S.W.2d 175, 183-84 (Tex. Crim. App. 1987) (trial court acted within its discretion in denying defense challenge for cause where, despite his belief in the religious maxim “an eye for an eye,” venireperson insisted that he could follow law on special issues).

(2) John Robuck

Appellant contends the court should have excluded Mr. Robuck because he could not consider the minimum punishment available for the lesser-included offense of murder. To qualify as a juror, a venireperson must be able to consider the full range of

punishment for any offense of which the accused might be found guilty. *See Ladd*, 3 S.W.3d at 559. A venireperson in a capital murder prosecution who cannot consider the minimum sentence authorized for the lesser-included offense of murder has a bias against the law which renders him challengeable for cause. *See Williams v. State*, 773 S.W.2d 525, 536 (Tex. Crim. App. 1988). Contrary to appellant's contention, Mr. Robuck clearly and firmly indicated his ability to consider the five-year minimum punishment for murder.

Initially Mr. Robuck told defense counsel that, even if he felt the minimum five-year punishment was deserved, he would not assess it in an intentional murder case. (RR18: 49-50). At this point, however, the trial court intervened and provided Mr. Robuck with the hypothetical about euthanasia of a spouse. Mr. Robuck responded to the court that he had "changed his mind" and that he could conceive of the minimum in such a case. Thereafter, he repeatedly acknowledged that, under the right circumstances, he could assess the minimum for murder. (RR18: 51-53). At worst, Mr. Robuck's initial answer was contradictory. The trial court, who is in the best position to observe the responses of the venirepersons and their demeanor, was free to reject that initial reply. That determination is entitled to deference. Mr. Robuck's subsequent responses overwhelmingly support that determination. *See Banda v. State*, 890 S.W.2d 42, 55 (Tex. Crim. App. 1994) (holding court did not abuse its discretion in denying challenge for cause alleging bias against law regarding minimum punishment for lesser-included offense of murder where venireperson first stated he could not consider it, but later stated he could assess it where appropriate).

(3) Thomas Brooks and Kimberly Williams

Appellant contends the court should have excluded Mr. Brooks and Ms. Williams for cause because, in addressing the future dangerousness special issue, they would construe “probability” to mean “possibility.” A venireperson who cannot interpret “probability” as something more than a “possibility” would be impaired in evaluating the evidence offered to prove future dangerousness and, thus, possesses a bias against the law that renders him challengeable for cause. *Hughes v. State*, 878 S.W.2d 142, 147-48 (Tex. Crim. App. 1995).

Both Mr. Brooks and Ms. Williams gave conflicting responses regarding their interpretation of the term “probability.” At one point, both stated that they equated “probability” with “a possibility” or “chance.” But at other times, each also responded that they interpreted it as meaning more than a mere possibility.

Brooks

The prosecutor first questioned Mr. Brooks about his understanding of “probability.”

[PROSECUTOR]: I want to talk to you just a moment about some of the words up here in [Special Issue] Number 1. The reason I do that is because most of these words don’t have legal definitions. Judge Entz is not going to tell you what these words should mean. You’re going to – you’re going to get to define them yourself.

The word “probability” first of all, whether there’s a probability that the defendant would commit criminal acts of violence. Probability, a lot of jurors tell me that when they think of probability, that’s – that’s more likely than not going to happen. There’s a likelihood it’s going to happen, as opposed to just a chance that it might happen. You can see that I don’t have to prove that there’s an absolute certainty that the defendant would commit criminal acts of violence, just a probability.

How do you – how do you look at that word, Mr. Brooks?

[BROOKS]: Well, I think I'd look at it in that respect. It's not definite.

[PROSECUTOR]: Uh-huh.

[BROOKS]: There's only a probability that it will happen in the future.

(RR28: 20).

This exchange shows that Mr. Brooks agreed with the prosecutor's definition of "probability" as "more likely than not going to happen," "a likelihood it's going to happen, as opposed to just a chance that it might happen," and "not an absolute certainty." Thus, Mr. Brooks did evince a proper understanding of "probability." See *Cuevas v. State*, 742 S.W.2d 331, 346-47 (Tex. Crim. App. 1987) (venireperson's testimony that he would define probability as "strong potential for it to happen" and "stronger than possibly" demonstrated he did not have faulty understanding of term's meaning).

When subsequently examined by defense counsel, Mr. Brooks reaffirmed his earlier answer that "probability" means "only a probability" and not "a definite thing." (RR28: 50). But when defense counsel asked for a numerical definition of the term, Mr. Brooks became confused.

Mr. Brooks initially responded, "I think that would totally depend on the individual." Defense counsel told Mr. Brooks he did not understand his answer and pressed him further, asking, "Is it at least 51 percent?" Ultimately, Mr. Brooks replied, "No," but he also continued to insist, "I think – I still go back to the fact that I think it's

the individual case, the individual.” At this point, Mr. Brooks told defense counsel he did not understand the question and the court intervened. (RR28: 50-51).

The court asked Mr. Brooks, “What is a word that you would use as an equivalent to probability? A synonym?,” and Mr. Brooks replied:

Well a probability would be something that’s possible in the future, but – if I’m looking at a scale from 1 to 10, I couldn’t say you as an individual speaking to me, what is that probability factor from 1 to 10, you know. I don’t know what you might do. I don’t think I can put a number on it.

(RR28: 52). Thus, even after the court’s intervention, Mr. Brooks apparently misunderstood the question to be how he would numerically define a particular defendant’s “probability” of being a future danger.

Immediately after the court’s intervention, the following exchange occurred between Mr. Brooks and defense counsel:

[DEFENSE]: Could you put – if you can’t put a number on it, could you say that probability is a chance or probability is more likely than not or probability is pretty certain?”

[BROOKS]: I think it’s only a chance.

[DEFENSE]: Only a chance?

[BROOKS]: Yes.

[DEFENSE]: And that would be your definition?

[BROOKS]: Yes.

[DEFENSE]: And that would be the definition that you would use?

[BROOKS]: Yes.

(RR28: 52).

By itself, this exchange reflects that Mr. Brooks equated “probability” with “possibility.” The remainder of Mr. Brooks’ voir dire indicates otherwise. *See Feldman*, 71 S.W.3d at 744 (must review ruling on challenge for cause in context of entire voir dire record). During the prosecutor’s questioning, Mr. Brooks had a proper understanding of the term’s meaning. Thus, at worst, the final exchange with defense counsel shows that Mr. Brooks gave conflicting answers about his understanding of “probability.” *Compare with Patrick*, 906 S.W.2d at 489 (holding trial court abused its discretion in denying challenge against venireperson who “never indicated that she observed a distinction” between “probability” and “possibility”); *Hughes*, 878 S.W.2d at 146-48 (holding trial court abused its discretion in denying challenge for cause against venireperson who unequivocally and insistently maintained that he understood “probability” as only a “possibility”).

The trial court, who witnessed Mr. Brooks’ confusion firsthand, apparently determined that the final exchange was just the result of Mr. Brooks’ continued confusion. That determination, entitled to great deference on appeal, is reasonable given the extent and nature of Mr. Brooks’ confusion evinced by the record. *See Feldman*, 71 S.W.3d at 744 (particular deference is given to trial court’s ruling on a challenge for cause when the potential juror’s answers are vacillating, unclear, or contradictory).

Williams

Like Mr. Brooks, Ms. Williams gave conflicting answers about her understanding of “probability.” When the prosecutor first asked her what the word meant to her, Ms. Williams replied, “It means it’s possible it could, or could have not.” (RR37: 146-47).

In response, the prosecutor explained to her that the future dangerousness special issue does not use the word “chance” or “possibility,” but “probability.” Then he asked her what numerical value, between zero and one hundred, that she would assign to it:

[WILLIAMS]: I would say 50.

[PROSECUTOR]: 50? Okay. All right. Probability is like a majority and a minority. To be a majority, would you agree with me that it has to be more than 50 percent to be a [sic] tea?

[WILLIAMS]: Yes.

[PROSECUTOR]: Anything less would be minority. Same kind of thing on probability. At least, to be a probability, can you see where it has to be at least greater than 50 percent? Now, it may be higher than that. If you want it to be higher, but can you agree with me it has to be at least greater than 50 percent? Anything less than that would simply be a possibility or a chance, which the law says I’ve got to prove more than that on Special Issue Number 1.

[WILLIAMS]: Yes.

(RR37: 147-48). Thus, early in her voir dire, Ms. Williams indicated that she agreed “probability” meant something greater than fifty percent.

Later, when examined by defense counsel, Ms. Williams repeated her previous statement that she would define “probability” as “a possibility” or “could happen again,” but she denied that she would define it as “a mere chance.” (RR37: 180). Defense counsel then began a line of questioning that served only to confuse both counsel and Ms. Williams:

[DEFENSE]: Okay. And that’s even if you thought — you talked with Mr. Davis that, you know, that might be over 50 percent, but in those things does that mean possibility to you?

[WILLIAMS]: You’re confusing me. Say that again.

[DEFENSE]: Okay. I'm confusing myself. For you, probability means possibility?

[WILLIAMS]: Correct.

[DEFENSE]: Okay. So the State would have to prove in answering – prove to you in Special Issue Number 1 that there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

[WILLIAMS]: Yes.

[DEFENSE]: An when we're talking about possibility is – when you're talking about possibility, is that – if we said, you know, 10 chances, are we saying 5 out of 10 chances, are we saying 1 out of 10 chances, or just a possibility that it could happen again?

[WILLIAMS]: It's a possibility that it could happen.

[DEFENSE]: So would it be less than 5 chances out of 10?

[WILLIAMS]: I don't understand what you're asking me?

[DEFENSE]: Okay.

(RR37: 181).

At this point, the court interrupted defense counsel and unsuccessfully attempted to clear up Ms. Williams' confusion:

[COURT]: Would it be less than 50 percent, or 50 percent, or more than 50 percent, your possibility in the context of Special Issue Number 1?

[WILLIAMS]: I can't say.

(RR37: 181-82).

When the trial court failed, defense counsel made one last effort:

[DEFENSE]: Okay. So basically just a possibility?

[WILLIAMS]: Yes.

[DEFENSE]: Okay. Let's say if the weatherman said there was a 10 percent chance of rain, would that [sic] you say that's a probability of rain?

[WILLIAMS]: I'd say it's possible.

[DEFENSE]: Okay. Possible in the context of Special Issue Number 1?

[WILLIAMS]: I would say it's possible.

[DEFENSE]: Okay. So in your mind possible and probability – possibility, probability mean the same thing.

[WILLIAMS]: That it could or could not happen.

[DEFENSE]: Okay.

* * * *

[DEFENSE]: For you to answer Special Issue Number 1 no, that there is not a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, would we have to prove to you that that answer should be answered no, that he would not be a continuing threat?

[WILLIAMS]: Could you rephrase that, because I'm not understanding what you're asking?

[DEFENSE]: Okay. This – I'm trying to figure out, and it may be just [sic] may be not understanding what you're saying. What probability means in your mind. Okay? I'm trying to figure out if probability means more likely than not or probability means possibility, or if all those things mean the same thing to you.

[WILLIAMS]: Probability means to me it's possible that it could happen or it couldn't happen. And until, you know, the evidence, you can't really say.

[DEFENSE]: Okay. If we're talking about a – an even chance that it could happen, it could or it could not happen like – like flipping a coin that it could or could not happen, is that a probability or is that a possibility to you. This is why people hate lawyers.

[WILLIAMS]: It's a possibility.

[DEFENSE]: Okay. And that's the possibility that you would go by when you're talking about possibility in regard to probability in Special Issue Number 1?

[WILLIAMS]: Yes.

(RR37: 182-84).

It is apparent from this lengthy exchange that defense counsel, herself, had difficulty discerning Ms. Williams' definition of "probability." Also, Ms. Williams, like Mr. Brooks, apparently misunderstood the requests to assign a numerical value to "probability," insisting that she could not assign such a value without hearing the evidence first. Ms. Williams did make certain things clear, however. While repeatedly interchanging "probability" with "possibility," she expressly stated that neither term meant "a mere chance." Also, when asked how she would classify a weatherman's forecast of "a ten percent chance of rain," Ms. Williams stated that it was a "possibility," not a "probability." Thus, at one point, Ms. Williams indicated that she considered "probability" to mean something greater than "possibility."

Although Ms. Williams' voir dire testimony is sometimes unclear and contradictory, at times, she evinced an understanding that probability meant something "more than 50 percent," that "probability" and "possibility" were not synonymous, that possibility meant something more than a mere chance, and that probability meant something more than possibility. From these replies, the trial court could have reasonably concluded that Ms. Williams did not have a faulty understanding of "probability." Thus, the trial court acted within its discretion in denying appellant's

challenge. *See Feldman*, 71 S.W.3d at 744 (particular deference is given to trial court's ruling on a challenge for cause when the potential juror's answers are vacillating, unclear, or contradictory).

Any Error Harmless

A defendant is harmed by the erroneous denial of a challenge for cause only if he uses a peremptory strike to remove the unsuccessfully challenged venireperson and then suffers a detriment from the loss of the strike. *Feldman*, 71 S.W.3d at 744. Although the trial court denied appellant's belated request for two more peremptory strikes, the court initially gave appellant three peremptory strikes in addition to the statutorily required fifteen. (RR4: 3). Thus, appellant must show that the court erroneously denied at least four of his challenges for cause. *Id.*; *see also Hughes*, 878 S.W.2d at 151 (opinion on rehearing) ("Where the court reinstates peremptory strikes, to show harm, the party complaining on appeal must show that one additional juror sat on the case than the number of reinstated peremptory strikes.").

As shown above, the denial of appellant's challenges for cause against venirepersons May, Robuck, Brooks, and Williams were all supported by the record. Appellant fails to demonstrate that even one of those denials was erroneous, much less all four. Thus, appellant demonstrates no harm. *See Feldman*, 71 S.W.3d at 748 (holding no harm from denial of three challenges for cause where defendant granted one extra peremptory strike and failed to show at least two were erroneously denied).

POINT 9: Effective Assistance of Counsel

Appellant contends defense counsel rendered ineffective assistance at trial when he peremptorily struck venirepersons John Wilson (No. 36) and Mark Colditz (No. 44). He maintains counsel's performance was deficient because she erroneously believed that she had previously challenged Mr. Colditz and Mr. Wilson for cause.

To prevail on his ineffectiveness claim, appellant must show by a preponderance of the evidence that counsel's decision to strike these two venirepersons was unreasonable by objective professional standards and that it prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999). The law presumes counsel's decision to strike constituted reasonable trial strategy. Thus, appellant must rebut that presumption and show a reasonable probability that, but for counsel striking these two venirepersons, the result of the proceeding would have been different. *Thompson*, 9 S.W.3d at 812-13. Absent some record evidence substantiating his claim that counsel's decision was unreasonable and prejudicial, appellant's ineffectiveness complaint must be rejected. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002) (ineffectiveness claims must be firmly founded in the record, not built on retrospective speculation).

Peremptory strikes are limited in number, and the determination of which venirepersons warrant the exercise of this restricted resource is an inherently strategic decision. *Hardin v. State*, 951 S.W.2d 208, 211 (Tex. Crim. App. 1997). Contrary to appellant's contention, counsel's decision to strike Mr. Wilson and Mr. Colditz was consistent with reasonable trial strategy.

In support of the request for two more peremptory strikes, defense counsel told the court that the defense had been forced to use some of its eighteen strikes to correct the court's erroneous denial of the defense's challenges for cause against venirepersons Marlin Cannon (No. 4), Phillip May (No. 12), Thomas Brooks (No. 23), Robert Wright (No. 28), Kimberly Edge (No. 32), John Wilson (No. 36), and Mark Colditz (No. 44). (RR44: 13-14). As asserted by appellant, the defense challenged neither Mr. Wilson nor Mr. Colditz for cause. (RR37: 135; RR41: 51). Counsel's misconception does not, by itself, establish that striking those two venirepersons was an unreasonable, unprofessional act.

The record reflects only that counsel misnamed those venirepersons struck by the defense because of a failed challenge for cause, not that she mistakenly struck them. Appellant hypothesizes that, if counsel had realized her mistake, she would not have struck Mr. Wilson and Mr. Colditz, but instead, Mr. Bachmeyer and Dr. Mendro, the two "objectionable" jurors she claimed the defense was forced to accept. It is more reasonable to infer that she would merely have corrected her misstatement and named two other venirepersons, not previously named, whom the defense had also unsuccessfully challenged.

There were several other unnamed venirepersons that the defense unsuccessfully challenged and subsequently struck.⁵ Counsel could have been referring to any two of

⁵ Gerald Smothers (No. 7), John Robuck (No. 13), Jon Clinton (No. 15), Douglas Layne (No. 18), Kimberly Williams (No. 37), and Alexander London (No. 38). (RR14: 104; RR18: 63; RR20: 61; RR23: 52; RR37: 188; RR38: 61-62; RR44: 6-7).

these venirepersons. Counsel clearly had two specific venirepersons in mind when she named Mr. Wilson and Mr. Colditz. She even recounted the nature of the defense's challenges for cause against one of them.⁶

Furthermore, although Mr. Wilson and Mr. Colditz were not challenged by the defense, counsel very likely had other grounds for striking them. Indeed, counsel struck many unchallenged venirepersons,⁷ and the voir dire responses of Mr. Wilson and Mr. Colditz gave the defense more than adequate grounds to eliminate them.

Mr. Wilson's voir dire revealed that his father worked as a Dallas police officer for over twenty-five years. (RR37: 87-88). Shockingly, Mr. Wilson was also a witness in a murder case; he found the body of a co-worker who had been shot by a disgruntled former employee. (RR37: 130-31).

Mr. Wilson strongly supported the death penalty; in fact, he believed it should be available for non-capital, intentional murders. (RR37: 89). He disagreed that anyone's "genetic circumstances of birth" should affect their punishment, insisting that someone's genes do not determine what they will do. (RR37: 132-34). In addition, he had previously served as a juror in two criminal trials, both of which resulted in convictions. (RR37: 135). Although Mr. Wilson insisted that he would be a fair and impartial juror,

⁶ Counsel stated that the defense challenged Mr. Colditz "based on the probability issue." (RR44: 14).

⁷ The following venirepersons were struck, but not challenged for cause, by the defense: Deborah Kappel (No. 22), Marilynn Chandler (No. 24), Connie Boales (No. 27), Ronnie Adair (No. 29), and Paula Kellner (No. 35). (RR27: 95; RR29: 52; RR31: 51; RR34: 58; RR37: 84; RR44: 8-10).

his familial connection to the police, his own personal encounter with another murder, his conservative opinions, and his service on two convicting juries made him highly unfavorable to appellant.

Mr. Colditz had no connections to the police or personal encounters with crime, but he had several opinions very unfavorable to the defense. He did not consider alcohol and drug use as mitigating facts, stating, "I don't go for those excuses at all." (RR41: 18). He even indicated that he did not consider severe mental retardation as mitigating, stating, "I just would have a great deal of [sic] problem with a person using an excuse for anything [sic] for violence." (RR41: 18-19). And although he ultimately stated that he would follow the law, Mr. Colditz acknowledged that he would be "reluctant" to acquit a defendant if the State failed to prove venue or if an officer failed to read one of the Miranda warnings before taking the defendant's confession. (RR41: 25-26, 40-43).

Proof of venue and the voluntariness of appellant's statements were contested issues at appellant's trial. Moreover, the defense strategy at punishment focused, in part, on appellant's alcohol and drug use. Thus, Mr. Colditz also gave the defense ample cause for concern.

By comparison, Mr. Bachmeyer and Dr. Mendro, the two "objectionable" jurors appellant claims counsel should have struck instead, appeared much more favorable to appellant. Mr. Bachmeyer believed the death penalty was a deterrent. He was Catholic, however, and stated that, although he "would if he had to," he would rather not participate in giving someone the death penalty. (RR22: 103). Thus, Mr. Bachmeyer indicated some reticence in assessing the death penalty.

Mr. Bachmeyer admitted that he would probably assess a harsher punishment if the victim were an eighty-year-old woman, and he stated that he would tend to answer the future dangerousness issue affirmatively if he found appellant guilty. (RR22: 130, 136). Yet he also said that he only considered conduct that actually harmed someone, versus mere threats, as “criminal acts of violence.” (RR22: 107).

Furthermore, he indicated that he might favorably view the defense’s punishment evidence of appellant’s alcoholism and drug abuse. His brother was a recovered drug addict, and Mr. Bachmeyer believed that drug and alcohol abuse were diseases. (RR22: 111-12). He also responded that he would want to hear from a psychiatrist in the punishment phase and that he would consider as mitigating the fact that someone had not received treatment for a condition that was an underlying cause of his criminal conduct. (RR22: 130-31, 134-35). Lastly, he was unperturbed that a convicted capital murderer might serve only forty years on a life sentence. (RR22: 126).

Dr. Mendro, like Mr. Bachmeyer, revealed some reticence about the death penalty, stating, “It’s not something I would willingly do if I had a choice otherwise.” (RR25: 6). Furthermore, although he said he was in favor of the death penalty, he would reserve it for crimes “where there was . . . the high probability that this person would never have respect for human life again.” (RR25: 29). He also said he disagreed with some death penalty verdicts he had heard about and that he could imagine there would be a capital case where a forty-year “life” sentence would be appropriate. (RR25: 38, 43).

Although Dr. Mendro would not consider age a mitigating factor in assessing punishment, he showed that he would be receptive to evidence of drug abuse. (RR25:

16-17). And significantly, he believed that a defendant who suffered from a difficult upbringing and other personal problems should be punished differently than a defendant who had led a charmed life. (RR25: 40-41). In contrast, he would only base a guilty verdict on circumstantial evidence if it was “compelling.” (RR25: 23).

Dr. Mendro’s nephew was a former Chicago police officer and now a Chicago fireman, but this connection to law enforcement was distant compared to Mr. Wilson’s. (RR25: 24-25). Moreover, Dr. Mendro had previously served on a jury in a criminal trial in which he acquitted someone of resisting arrest. In fact, the State had given him a “bad juror” rating for his service in that case. (RR25: 25-26).

From the voir dire response of all four of these men, counsel could have reasonably concluded that Mr. Bachmeyer and Dr. Mendro would be more favorable to appellant than Mr. Wilson and Mr. Colditz would have been. Thus, the record supports the presumption that counsel’s decision to strike Mr. Wilson and Mr. Colditz rather than Mr. Bachmeyer and Dr. Mendro constituted sound trial strategy. *See McCoy v. State*, 996 S.W.2d 899, 900 (Tex. App. – Houston [14th Dist.] 1999, pet. ref’d) (holding counsel not ineffective for striking four venirepersons instead of others where no record evidence showed that the other venirepersons would have been more favorable than four that were struck).

Furthermore, appellant presents no evidence of which two venirepersons counsel chose to strike instead of Mr. Bachmeyer and Dr. Mendro. Indeed, there were numerous other venirepersons struck by the defense, any of whom could have been struck in place of Mr. Bachmeyer and Dr. Mendro. Thus, appellant fails to demonstrate that counsel

would have struck Mr. Bachmeyer and Dr. Mendro instead of Mr. Wilson and Mr. Colditz if she had realized that Mr. Wilson and Mr. Colditz had not been challenged for cause.

Even if the voir dire responses of Mr. Wilson and Mr. Colditz had been more favorable to the defense than those of Mr. Bachmeyer and Dr. Mendro, appellant's ineffectiveness claim still fails because he makes no showing that, but for the way counsel exercised strikes, the result of appellant's trial would have been different. Indeed, given the unfavorable responses of Mr. Wilson and Mr. Colditz, it is highly likely that the result would have been the same. Therefore, appellant fails to prove counsel's decision to strike Mr. Wilson and Mr. Colditz prejudiced him. *See McCoy*, 996 S.W.2d at 900 (overruling ineffectiveness claims where no showing outcome would have been different if different veniremen struck); *see also Nonn v. State*, 13 S.W.3d 434, (Tex. App. – Corpus Christi 2000), *vacated on other grounds*, 41 S.W.3d 677 (Tex. Crim. App. 2001) (holding appellant failed to prove counsel was ineffective for not striking venireperson where no record evidence showing that, but for counsel's failure to strike her, result of proceeding would have been different).

Because appellant neither rebuts the presumption of reasonable trial strategy nor demonstrates any prejudice, this Court should overrule his attack on counsel's effectiveness.

POINT 10: Request for Abatement

Appellant contends this Court needs to abate the appeal so that the trial court can issue findings of fact and conclusions of law regarding the admissibility of appellant's oral and written statements to the police. On June 6, 2002, the Court granted appellant's request, abated the appeal, and ordered the trial court to prepare findings of fact and conclusions of law as required by article 38.22, section 6 of the criminal procedure code. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (Vernon 1979). The trial court has since prepared the ordered findings and conclusions and forwarded them to the Court as directed. Therefore, appellant's tenth point of error is moot.⁸

POINT 11: Attorney-Client Privilege

Appellant contends the State violated his Sixth Amendment right to counsel by reading privileged communications written by him to his attorneys. On May 6, 2001, approximately one month before trial began, appellant attempted suicide in the jail. Pursuant to office policy, sheriff's deputies treated appellant's cell as a crime scene, searched for a suicide note, and seized a number of items, including some papers. (CR4: 914; RR49: 2-4, 16). A week or two before trial began, the prosecutors assigned to appellant's case learned that items had been recovered and went to the jail to review them. (RR49: 34; RR50: 3-5, 8). Among the papers seized were letters received by

⁸ Appellant filed no supplemental brief raising any complaint regarding the admission of the statements he made to the police.

appellant from his relatives, some religious materials, and three pages handwritten by appellant. (Defense Exhibits 6A, 6B, 6C).

Both prosecutors read the letters from appellant's family and reviewed the religious materials. One of them also reviewed the three handwritten pages, reading portions of them. The prosecutors neither requested nor obtained from the Sheriff's Office any copies of these three handwritten pages.⁹ (RR49: 4-5; RR50: 5-7, 8-9). And the State did not offer the pages as evidence at trial.

Appellant moved to suppress all the items recovered from his cell, claiming they were the fruits of an improper warrantless search. He also argued that the three handwritten pages were protected by the attorney-client privilege.¹⁰ The court found the search of appellant's cell lawful. Moreover, while finding that the three pages handwritten by appellant were protected by the attorney-client privilege, the trial court determined that the disclosure of these pages to the prosecution was "harmless." (RR51: 47-50).

On appeal, appellant claims the deputies' interception of these privileged pages and their subsequent disclosure to the State is, by itself, sufficient to establish a violation of his constitutional right to counsel. Appellant's complaint ignores more recent

⁹ The State did obtain copies of the letters from appellant's relatives. (RR49: 4-5).

¹⁰ Appellant requested only the suppression of the three handwritten pages. He never asked the court to declare a mistrial, nor did he move for a new trial based on this privilege claim. (CR1: 130-31, 219; RR50: 16-22, 47-48).

Supreme Court precedent and contrary authority from several federal circuit courts, including the Fifth Circuit Court of Appeals.

The State's intrusion into the attorney-client relationship violates a defendant's constitutional right to counsel only where the defendant was also prejudiced by the intrusion. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also United States v. Morrison*, 449 U.S. 361, 365 (1981). A defendant is prejudiced if there is a "realistic possibility of injury" to him or "benefit to the State" as a result of the intrusion. *Weatherford*, 429 U.S. at 558. What constitutes a sufficient showing of prejudice and which party is responsible for proving prejudice or the lack thereof is a matter of dispute among the federal circuit courts. *See Cutillo v. Cinelli*, 485 U.S. 1037, 1037-38 (1988) (White, J., dissenting) (arguing that certiorari should be granted to resolve conflict among circuit courts regarding which party bears burden of proving prejudice or lack thereof from transmission of confidential attorney-client communications).

The D.C. and Third Circuit Courts of Appeals would presume prejudice from the fact that privileged communications were intercepted and disclosed to the prosecution. *See United States v. Briggs*, 698 F.2d 486, 494-95 (D.C. Cir. 1983); *United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1979). But the Fifth Circuit Court of Appeals, like several other circuit courts,¹¹ has repeatedly and consistently refused to presume

¹¹ *United States v. Steele*, 727 F.2d 580, 586-87 (6th Cir. 1984); *United States v. Irwin*, 612 F.2d 1182, 1186-89 (9th Cir. 1980); *United States v. Dien*, 609 F.2d 1038, 1043 (2nd Cir. 1979); *Mastrian v. McManus*, 554 F.2d 813, 821 (8th Cir. 1977). *See also United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984) (holding defendant bears initial burden of establishing prima facie case of prejudice, then burden shifts to State to rebut prima facie showing).

prejudice and has placed the burden of proving prejudice on the defendant. *See, e.g., United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000); *United States v. Melvin*, 650 F.2d 641, 644 (5th Cir. 1981); *United States v. Sander*, 615 F.2d 215, 219 (5th Cir. 1980); *United States v. Kilrain*, 566 F.2d 979, 982 (5th Cir. 1978).

At the very least, some finding of prejudice must be made before appellant's conviction can be deemed unconstitutional. *See Weatherford*, 429 U.S. at 552 ("when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial"). Appellant made no such showing. And even if he had no duty to prove prejudice, the record affirmatively reflects that he suffered none.

Appellant argues that the State's intrusion was "egregious," but this characterization is unfounded. The record reflects that the prosecutors were not looking for privileged materials, but evidence related to appellant's suicide attempt. (RR49: 4-5). Also, the prosecutor who looked at the three handwritten pages did so believing them to be personal notes, rather than correspondence from appellant to his attorneys. (RR46: 30; RR48: 6-7; RR49: 6; RR50: 11-12, 14). The prosecutor who saw the pages did not read them in their entirety. He stated that he "glance[d] over" them, reading only portions. (RR49: 4; RR50: 9). And apparently, the prosecutor gleaned little from the portions he read. He stated that he realized they related to Detective Myers' testimony at the examining trial, but he recounted no other information contained within the pages. (RR49: 6; Defense Exhibit 6A). Furthermore, neither this information nor any other information within the three pages prejudiced appellant.

Appellant does not identify how any information in the pages injured him or helped the State. They were never admitted as evidence at trial. And although given the opportunity by the trial court, appellant neither asserted nor demonstrated how any particular piece of information was used. (RR50: 12-15). He claimed instead that harm was "implied" because the pages informed the State of the defensive theory and the weaknesses the defense perceived in the State's case. (RR51: 47-48). The record refutes this contention.

The prosecutor repeatedly and emphatically denied using any of the information in the three pages in preparing for trial or during trial. (RR49: 6-7; RR50: 13-15). This denial is affirmed by record evidence that the prosecutor did not even see these pages until approximately two weeks before trial began. (RR49: 3-4; RR50: 3; RR51: 42). At that point, the State's preparation for trial had been long underway, and the State had already received the information contained in these pages from other sources.

In the first of the three pages, appellant wrote that Detective Myers, the officer who interviewed him after his arrest, made false statements about appellant's interrogation. (Defense Exhibit 6A). In particular, appellant asserted that there was video and audio recording equipment in the interview room, that he was drunk and sleep-deprived, and that officers interviewed him until noon the next day.

The prosecutor expressly denied discussing this information with Detective Myers, using it to prepare the detective for cross-examination, or forming any strategy from it. (RR50: 14-15). The State examined the detective about the circumstances surrounding the taking of appellant's written confession, but appellant had filed a motion, months

before trial, challenging the voluntariness of the statement. (CR2: 436-37; RR45: 5-96; RR48: 130-203). Thus, as in any case where the defendant challenges the admissibility of his confession, the manner in which appellant's interview was conducted, as well as his physical and mental state, were facts crucial to the determination of his confession's admissibility.

Furthermore, the particular grounds upon which the defense challenged the voluntariness of appellant's confession were not revealed to the State by the pages found in appellant's cell. Those grounds were far from secret. The confession itself was replete with references to drunkenness and sleeplessness. Appellant stated that he began drinking before the murder and continued drinking over the next two days in an effort to "block out what had happened." Appellant also mentioned that he had been up for two days only to be awakened by the police. (State's Exhibit 47).

In addition, the investigators discovered, long before appellant's trial, that he had purchased alcohol with the stolen credit cards. (CR4: 755, 764-65, 776, 911-12). An investigator's notes revealed witnesses interviewed early on in the case who mentioned that appellant had been drinking heavily after the offense. (CR4: 764, 782). Moreover, a Van Zandt County Sheriff's Department report showed that appellant had been arrested at about 3:00 a.m., then arraigned, transported to the Garland Police Department, and interviewed at around 9:00 a.m. (CR4: 848-49). Also, appellant's medical records contained numerous references to his bouts with sleeplessness. (State's Exhibits 145, 146). Thus, the State had ample notice from other sources that appellant's wakefulness and sobriety when he confessed would be at issue at trial.

As for the recording devices appellant asserted were hidden in the interview room, appellant specifically moved for the disclosure of any evidence that such devices were used.¹² One of these motions was filed the very day the prosecutor looked at the papers taken from appellant's cell. (CR1: 19-23, 43-51). Thus, the defense's intent to put in issue the presence of any recording was not a secret strategy revealed only by the privileged pages.

The rest of the information contained in the three pages was no more illuminating or helpful to the State. On the back of the first page, appellant claims that "the person who is guilty of this lives within me," that he deals with "many different people and voices and visions," that he has wanted to die for years, and that he needs assistance obtaining medication from the jail psychiatrist. This page ends with the statement, "[I]f honestly my choices are life or death I'm pleading guilty. Life in prison is death to me anyway." The remaining two pages are similar in content.

The second page, entitled "Questions for my lawyers," contains no questions or strategy suggestions. (Defense Exhibit 6B). It is nothing but a lengthy plea for

¹² In particular, the motion requests disclosure of

27. Any videotape, audiotape or closed circuit television equipment available for use by the Garland Police Department in its interrogation rooms, whether or not used in this case, and a copy of the videotape or audiotape of the interrogation of Defendant, if one exists, or the names or addresses of those people who observed the interrogation of Defendant by closed circuit television, if they did; or the names and addresses of any one who observed the interrogation of Defendant but was not in the same room as defendant, and any reports made or notes taken of such observation."

(CR1: 21).

assistance in getting medication in jail. Appellant details his numerous mental disorders and claims he needs to be medicated. He asserts that “this happened” only because he quit taking his medications and that, without medication, he will lose his mind, black out, hallucinate, or suffer “auditory visions.”

The third, untitled page is much like the second page. (Defense Exhibit 6C). Once again appellant claims he suffers from hallucinations and that he will lose his mind without medication. He asserts that he drinks voraciously “so that I don’t have these problems,” and he claims that, despite his efforts to seek help, the jail psychiatrist is not assisting him.

None of this information was news to the State. The State already had access to a plethora of medical records that contained an enormous amount of information about appellant’s alcoholism, suicidal tendencies, and other mental disorders, including depression, dissociative identity disorder, bipolar disorder, and blackouts. (CR4: 863-64; State’s Exhibits 145, 146). Indeed, when cross-examined by the defense from where else he could have obtained information about appellant’s claimed hallucinations and “split personality,” the prosecutor readily identified these medical records as the source of his information. He also noted that appellant had complained of hallucinations when he was booked into jail. (RR50: 12-13).

The possibility that appellant would present a defense related to his alcoholism, suicidal tendencies, and other mental disorders certainly came as no surprise to the State. Such a strategy was readily apparent from and revealed in appellant’s confession and his pretrial motions. As previously noted, appellant’s confession is replete with references to

drinking, sleeplessness, and suicidal thoughts. (State's Exhibit 47). Also, in the pretrial motion filed the same day as the prosecutor saw the pages from appellant's cell, appellant requested disclosure of any evidence of appellant's intoxication around the time of the offense, expressions of remorse, or suicidal tendencies. (CR1: 19-23).

Despite this overwhelming record evidence that appellant suffered no prejudice from the State's intrusion, appellant asks this Court to reverse and remand this case for a new trial. To do so, this Court would have to ignore the trial court's determination that the prosecutor truthfully obtained and used nothing from the three pages. (RR50: 22; RR51: 48). Reversal would also contravene legal precedent precluding such an extreme remedy in the absence of any prejudice to the defense. *Compare with Brewer v. State*, 649 S.W.2d 628, 632 (Tex. Crim. App. 1983) (holding right to counsel violated where prosecutor ordered confidential informant to record confidential conversations between defendant and his attorney and prosecutor used tapes to prepare for trial and introduced them as evidence).

Thus, as the trial court concluded, any intrusion was "harmless beyond a reasonable doubt." (RR51: 48). *See Davis*, 226 F.3d at 353 (holding right to counsel not violated by State's seizure of documents protected by attorney-client privilege where documents were sealed and not introduced as evidence and defendant failed to show how any document revealed his strategy or otherwise harmed him); *Ott v. State*, 627 S.W.2d 218, 223-24 (Tex. App. – Fort Worth 1981, pet. ref'd) (holding right to counsel not violated by State's seizure of defendant's trial notes left in deputy's squad car where prosecutor "took a look at them" shortly before trial ended and never used them in any

way). Therefore, appellant's right to counsel was not violated, and this Court should overrule this attack on the constitutionality of his conviction.

POINT 12: Proof of Venue

Appellant contends the evidence is insufficient to prove that venue for this offense lay in Dallas County. He argues that the State had to prove venue lay in Dallas County under the homicide venue statute. TEX. CODE CRIM. PROC. ANN. art. 13.07 (Vernon 1977). The homicide venue statute permits prosecution in the county where the injury was inflicted, death occurred, or the body was found. Appellant insists the evidence is insufficient to prove that Bertie Cunningham was injured, died, or found dead in Dallas County and that, therefore, he is entitled to a new trial.

Venue is not a criminative fact and, therefore, not an element of appellant's offense. *Boyle v. State*, 820 S.W.2d 122, 140 (Tex. Crim. App. 1989). Thus, it need be proved only by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 13.17 (Vernon 1977). Contrary to appellant's contention, the evidence is sufficient to prove venue in Dallas County under the homicide venue statute. It is also sufficient to prove venue in Dallas County under several other venue statutes, all of which were applicable to this case.

The State charged appellant with capital murder, specifically, murder in the course of a kidnapping and robbery. (CR1: 2). Over appellant's objection, the trial court instructed the jury that the State may prove venue under the general venue statute, the theft venue statute, the homicide venue statute, the kidnapping venue statute, or the

“venue undeterminable” statute. (RR52: 2-6). *See* TEX. CODE CRIM. PROC. ANN. arts. 13.07, 13.08, 13.12, 13.18, & 13.19 (Vernon 1977). In particular, the court instructed the jury that venue for the offense of capital murder was proper:

- (1) in the county in which the offense was committed, or
- (2) where the property is stolen in one county and removed by the offender to another county, in the county where the defendant took the property or in any other county through or into which he may have removed the same, or
- (3) if a person receives an injury in one county and dies in another by reason of such injury, in the county where the injury was received or where the death occurred, or in the county where the dead body is found, or
- (4) in the county in which the kidnapping offense was committed or in any county through, into, or out of which the person kidnapped may have been taken.

However, if an offense has been committed within this State and it cannot readily be determined within which county or counties the commission took place, trial may be held in the county in which the defendant resides, in the county in which he was apprehended, or in the county to which he was extradited.

(CR1: 179-80).

Appellant argues, as he did at trial, that submitting these five methods of proving venue was improper. (RR52: 2-4). Appellant is incorrect.

The law requires the court to submit instructions “distinctly setting forth the law applicable to the case.” TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981). If available, specific venue statutes must be applied. *See* TEX. CODE CRIM. PROC. art. 13.18; *see also Stewart v. State*, 44 S.W.3d 582, 586-89 (Tex. Crim. App. 2001) (holding specific theft venue statute controlled over general venue statute). There is, however, no “capital murder venue statute.” Thus, the law governing venue in a capital case is not

limited to any one statute. Furthermore, where appropriate, the law allows the application of multiple venue provisions. *See Hignite v. State*, 522 S.W.2d 210, 213-14 (Tex. Crim. App. 1975) (holding jury could have properly found venue in county of prosecution under either 13.08 or 13.19 in robbery case); *see also Whitley v. State*, 635 S.W.2d 791, 797 (Tex. App. – Tyler 1982, no pet.) (holding trial court properly instructed jury on venue under articles 13.01 and 13.19 in injury to a child case). Indeed, the venue statutes themselves use permissive, not mandatory, language. *See, e.g., TEX. CODE CRIM. PROC. art. 13.07* (stating that the offender “may” be prosecuted in a particular county).

The determination of which venue statutes apply in a particular case is a mixed question of law and fact. The trial court must examine the facts of the case and apply the statutory requirements to those facts to determine the appropriate venue statute. *Stewart*, 44 S.W.3d 586. In this capital murder case, any one of the five statutes the trial court submitted to the jury could have applied.

The State alleged a murder, so the homicide venue statute obviously applied. TEX. CODE CRIM. PROC. art. 13.07. But the State alleged that the murder occurred in the course of a kidnapping and a robbery. (CR1: 2). Thus, the venue statutes governing kidnapping and robbery were pertinent as well.

There is a venue statute specifically governing kidnapping, but none devoted solely to robbery. TEX. CODE CRIM. PROC. art. 13.12 (“false imprisonment and kidnapping” venue statute). Thus, robbery could be governed by either the general venue statute or the theft venue statute. *See Ex parte Watson*, 601 S.W.2d 350, 351 (Tex. Crim.

App. 1980) (holding venue for the offense of aggravated robbery is the county where the offense was committed); *Hignite*, 522 S.W.2d at 214 (holding theft venue statute could also apply in robbery case). Furthermore, there was clearly a factual uncertainty as to where this capital murder occurred. Consequently, the “venue undeterminable” statute was also germane. *See Hignite*, 522 S.W.2d at 214 (“if it can be validly argued that it is not clear just where the offense commenced or was completed, then venue was properly laid under the provisions of Article 13.19”).

The State proved by a preponderance of the evidence that venue lay in Dallas County under each of these applicable venue provisions. As appellant notes, he never pinpointed for police the exact location of the abduction or the shooting. (RR48: 172-74, 210-11). There was evidence, however, from which the jury could have reasonably deduced that both of these acts occurred in Dallas County.

In his confession, appellant admitted that just before the offense, he was drinking at Bleachers. This is a bar located in Dallas County. (RR48: 171-72, 182; State’s Exhibit 47). Appellant confessed that he left this bar on foot and encountered Ms. Cunningham “on the road beside Bleachers on my way to 635.” (RR48: 182-83; State’s Exhibit 47). Detective Myers explained that Bleachers is located on Arapaho Road and that Arapaho turns into North Garland Road, which intersects with 635 (LBJ Freeway). (RR48: 184). According to Detective Myers, this area from Bleachers to 635 is located in Dallas County. (RR48: 184-85). The jury could have inferred from this evidence that the abduction occurred in Dallas County. Thus, under the kidnapping venue statute, the jury could have found the evidence sufficient to prove venue in Dallas County. *See Larrabee*

v. State, 746 S.W.2d 264, 267-68 (Tex. App. – Amarillo 1988, pet. ref'd) (holding testimony of complainants that they “hitched” a ride, but then were held against their will and assaulted until their release in Ochiltree County, sufficient to prove venue in Ochiltree County under kidnapping venue statute).

Appellant’s confession also supports the inference that the shooting occurred in Dallas County. Appellant admitted that he and Ms. Cunningham were driving toward 635 when he stopped, put her in the trunk, and shot her. (RR48: 183; State’s Exhibit 47). This admission indicates that the shooting occurred somewhere within the same area of Dallas County – between Bleachers and 635 – as the abduction occurred. (RR48: 183-84). As previously noted, Detective Myers testified that this area was located within Dallas County. (RR48: 184-85). From this evidence, the jury could have inferred that the shooting, i.e., the injury, occurred in Dallas County and, thus, that venue lay in Dallas County under the homicide and general venue statutes. *See Washburn v. State*, 692 S.W.2d 576, 577 (Tex. App. – Houston [1st Dist.] 1985, no pet.) (holding evidence that victim received injuries in Harris County sufficient to prove venue in Harris County under homicide venue statute); *Gill v. State*, 646 S.W.2d 532, 533 (Tex. App. – Houston [1st Dist.] 1982, no pet.) (holding evidence sufficient to prove venue for robbery lay in Harris County where evidence showed defendant injured complainant while stealing her purse in downtown Houston).

The jury could have also deduced that Ms. Cunningham died in Dallas County. Appellant apparently left her in the trunk after the shooting and drove to various locations in Dallas County at which he used her ATM and credit cards. (RR47: 100, 132-33, 150-

51, 157-58; RR48: 261). Furthermore, the medical examiner testified that, although Ms. Cunningham's wound was fatal, death was not instantaneous; she could have lived for several minutes or longer "in a comatose state." (RR49: 50-51, 58-59). From this evidence the jury could have deduced that Ms. Cunningham died in the trunk while appellant was driving around Dallas County. Thus, once again, the jury could have concluded that venue lay in Dallas County under the homicide venue statute. *See Washburn*, 692 S.W.2d at 576 (holding evidence sufficient to prove venue in Harris County under homicide venue statute where evidence showed victim died in Harris County).

Moreover, there is overwhelming evidence that appellant used Ms. Cunningham's car and her credit cards in Dallas County. (RR47: 89, 98-99, 132-33, 150-51, 157-58; RR48: 261). Thus, if appellant robbed Ms. Cunningham of her car and cards while in some county other than Dallas County, i.e., Collin County, the evidence shows that he removed this stolen property to Dallas County. From this evidence, the jury could have found that venue was proper in Dallas County under the theft venue statute. *See Hignite*, 522 S.W.2d at 214 (holding evidence that defendant car-jacked complainant in Dallas County and then drove to Collin County and shot complainant would be sufficient to prove venue in either Dallas or Collin County under theft venue statute).

Finally, record evidence shows that, at the time of the offense, appellant was living at his sister's home in Dallas County. (RR48: 261; State's Exhibits 35, 36, 47). Given the factual uncertainty regarding where Ms. Cunningham's abduction, shooting, and death occurred, the jury could have relied on evidence of appellant's residence as proof

that venue lay in Dallas County under the “venue undeterminable” statute. *See* TEX. CODE CRIM. PROC. art. 13.19 (providing for prosecution “in county in which defendant resides”); *cf. Hignite*, 522 S.W.2d at 214 (holding evidence that defendant apprehended in Collin County sufficient to prove venue in Collin County under article 13.19).

Even assuming the court should have omitted one or more of the above venue provisions from the jury charge, the evidence is still sufficient to support appellant’s conviction. The sufficiency of the evidence is measured against the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997). The hypothetically correct charge is one that “accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.* at 240.

Assuming the hypothetically correct jury charge would have incorporated only the homicide venue statute, the evidence is still sufficient to prove venue as long as the preponderance of the evidence shows that Ms. Cunningham was injured, died, or found dead in Dallas County. As previously noted, there is sufficient record evidence to support a finding that Ms. Cunningham was injured and died in Dallas County. Thus, any error in the Court’s venue instructions has no bearing on the sufficiency of the evidence. *See Curry v. State*, 30 S.W.3d 394, 404-07 (Tex. Crim. App. 2000) (holding hypothetically correct jury charge would have required proof of manner and means allegation which was unlawfully struck from indictment, but evidence was sufficient to prove omitted manner and means allegation and, thus, sufficient to support conviction).

For these reasons, this Court should overrule appellant's attack on the sufficiency of the State's proof of venue.

POINT 13: Admissibility of Identification Testimony

Appellant contends the trial court should have excluded evidence of Sherryl Wilhelm's out-of-court photographic identification of him as the man who abducted her from an Arlington hospital parking lot in August 1997. Appellant argues admission of this evidence violated his federal due process right because the identification procedure was impermissibly suggestive. *See* U.S. CONST. amend. V.¹³

The admission of an out-of-court identification of the accused deprives him of due process only if (1) the out-of-court identification procedure was impermissibly suggestive, and (2) the procedure gave rise to a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). These two factors are determined by examining the totality of the circumstances surrounding the identification. *See Simmons v. United States*, 390 U.S. 377, 384 (1968). The accused bears the burden of proving them both by clear and convincing evidence. *Barley v. State*, 906 S.W.2d 27, 33-34 (Tex. Crim. App. 1995). Appellant proves neither.

¹³ Appellant does not challenge the admission of Ms. Wilhelm's in-court identification of him as her abductor.

Procedure Not Impermissibly Suggestive

While appellant asserts that the lineup from which Ms. Wilhelm identified him was impermissibly suggestive, he provides no argument or authority to support this assertion. He does note, however, that he objected to the lineup at trial because it “appears to be different races . . .” (RR53: 125). Also, he cites Dr. Leon Peek’s punishment testimony that the other subjects in the lineup did not fit Ms. Wilhelm’s description of her attacker, namely, two of them appeared to be Hispanic, a third had “rosy” cheeks, and one was considerably older. (RR54: 53-54). Thus, the State assumes appellant is predicated his suggestiveness claim upon alleged differences in the race, complexion, and age of appellant and the remaining five subjects. A review of the lineup refutes appellant’s claim of suggestiveness on these or any other bases.

The lineup was composed and presented to Ms. Wilhelm by Detective John Stanton. When Stanton showed Ms. Wilhelm the lineup, he in no way suggested appellant. He told her that her abductor’s photograph might or might not be in the lineup and that she did not have to select anyone. Then he laid the lineup on a well-lighted surface and remained silent while she examined it. (RR45: 112-13; RR53: 102-03).

The lineup contains photographs of six different male subjects, one of which is appellant. The lineup depicts only the head and neck of each man, and Stanton modified the pictures by computer, making them appear similar in position, size, and background. (RR53: 114; State’s Exhibit 142). Stanton testified that he chose the five remaining male subjects for their similarities to appellant in race, age, and hairstyle. (RR53: 101).

Stanton's efforts to select subjects that resembled appellant and each other are reflected by the lineup.

Each subject has short, dark hair, dark eyes, and facial hair that is similar in style and length. And there are no variations in the subjects' appearances that single appellant out from the others. Appellant and two other subjects have receding hairlines, and at least five of the subjects, including appellant, appear to be of similar ages. Moreover, appellant's skin tone is not significantly lighter or darker than the remaining subjects. Arguably, two of the subjects have Hispanic features,¹⁴ but the four remaining subjects, including appellant, do not. In sum, appellant is not distinguished from all the other subjects by his race or any other physical characteristic. *Cf. Zarychta v. State*, 44 S.W.3d 155, 170 (Tex. App. – Houston [14th Dist.] 2001, pet. ref'd), *cert. denied*, 122 S.Ct. 2312 (2002) (holding lineup not suggestive despite defendant's assertion that he was the only Caucasian in lineup, where lineup consisted of six subjects of varying degrees of dark hair and dark complexions and officer selected Hispanic subjects because he believed defendant was Hispanic); *Perez v. State*, 41 S.W.3d 712, 720-21 (Tex. App. – Corpus Christi 2001, pet. ref'd) (holding lineup not suggestive where only minimal difference in skin color between defendant and five other subjects and all, including defendant, were young, Hispanic men with comparable facial features and short, dark hair).

The appearance of each subject does vary somewhat from the others, but that fact does not render the lineup suggestive. Neither due process nor common sense requires

¹⁴ The actual race of the lineup subjects is not reflected in the record.

that the subjects be identical. A photographic lineup need only contain photographs of individuals fitting the rough description of the suspect. *Dickson v. State*, 492 S.W.2d 267, 271 (Tex. Crim. App. 1973); *see also Brown v. State*, 64 S.W.3d 94, 100 (Tex. App. — Austin 2001, no pet.). In this case, all of the subjects in the lineup fit the general description Ms. Wilhelm gave of her abductor.

Immediately after her kidnapping, Ms. Wilhelm described her abductor to police as a white male in his early to mid-twenties, five-feet ten-inches tall, thin to medium build, with dark eyes, tanned or olive complexion, an earring in one ear, one day's growth of beard, and short, black hair that was shaved shorter on the sides and had no part. (RR45:145-47; RR53: 97, 144-45). Neither the build nor height of the subjects is discernible from the photographs, and none of the subjects is wearing an earring. But consistent with Ms. Wilhelm's description, each of the men in the lineup has dark eyes and short, dark hair with no part. Moreover, although the skin tones of each subject vary slightly in shade, all could be described as "tanned" or "olive complected."

All of the subjects have more than a day's growth of beard, and one of the subjects could be described as older than in his mid-twenties. But not every feature of every subject in the lineup must match the pre-identification description of the offender. *Ward v. State*, 474 S.W.2d 471, 476 (Tex. Crim. App. 1971). And in this case, the distinctions are insignificant. Any age difference is minimal and, although all the subjects have more than a "five o'clock shadow," the facial hair of each is closely cut and similarly styled. *See Davis v. State*, 649 S.W.2d 380, 382 (Tex. App. — Fort Worth 1983, pet. ref'd) (lineup not rendered impermissibly suggestive by inclusion of one subject about twenty

years older than defendant and another subject with full beard instead of “peach fuzz” described by witness).

In addition to purported variations in the subjects’ physical appearances, appellant notes that Ms. Wilhelm viewed a photograph of him on television before identifying him in the lineup. That broadcast was related to Ms. Cunningham’s murder, however, not Ms. Wilhelm’s kidnapping. Also, appellant looked different in the televised photograph than he did in the photograph Stanton put in the lineup. Although both were apparently “mugshots,” the lineup photograph was taken near the time of Ms. Wilhelm’s 1997 kidnapping. And according to Ms. Wilhelm, appellant’s hair was longer in televised photograph than it had been in 1997.¹⁵ (RR53: 119-20, 151).

But more importantly, the television broadcast of appellant’s photograph was an independent act of the media. It was not an official act by law enforcement designed to suggest appellant’s identification to anyone. *See Rogers v. State*, 774 S.W.2d 247, 259-60 (Tex. Crim. App. 1989) (constitutional proscription against suggestive pretrial identification procedures applies only to procedures directed by law enforcement officials). Therefore, it had no bearing on the admissibility of Ms. Wilhelm’s pretrial identification of appellant. *See id.* (lineup not rendered suggestive by publication of defendant’s photograph in newspaper where no showing publication related to greater scheme by officer to suggest to unsuspecting public that defendant was, in fact, the

¹⁵ The photograph released by the media was not offered or admitted at trial and, thus, is not a part of the appellate record.

murderer); *see also Craig v. State*, 985 S.W.2d 693, 694 (Tex. App. – Houston [1st Dist.] 1999, pet. ref'd) (lineup not rendered suggestive by witness' viewing of defendant's photograph on telecast of Crime Stoppers).

In short, neither the photographs themselves nor any other aspect of the pretrial identification procedure was suggestive, much less impermissibly so. Even if impermissibly suggestive, however, Ms. Wilhelm's identification of appellant was still sufficiently reliable to warrant its admission.

No Likelihood of Misidentification

An identification that stems from an impermissibly suggestive pretrial procedure must be excluded only if there exists a substantial likelihood of misidentification. In other words, an identification that is reliable notwithstanding suggestive procedures is admissible. *Biggers*, 409 U.S. at 198. Reliability is determined from the totality of the circumstances surrounding the identification, including, but not limited to: (1) the witness' opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of her prior description of the criminal, (4) the level of certainty demonstrated when subsequently confronted with the criminal, and (5) the time between the crime and the confrontation. *Id.* at 199-200; *see also Simmons*, 390 U.S. at 383. These factors are issues of fact that are to be reviewed in the light most favorable to the trial court's ruling. *Loserth v. State*, 963 S.W.2d 770, 773 (Tex. Crim. App. 1998). Viewed in this light, the factors should then be weighed de novo against the corrupting effect of the suggestive pretrial procedure. *Id.* at 773-74.

Appellant contends Ms. Wilhelm's identification of him is unreliable because she had only a limited opportunity to view her abductor, she did not identify appellant as her abductor until after she saw his photograph on television, and she was initially unable to identify him in court. Appellant mischaracterizes Ms. Wilhelm's ability to observe him during the kidnapping, and he ignores other relevant circumstances showing the dependability of her identification.

Opportunity to View Abductor

The abduction occurred outside in broad daylight late one morning. Ms. Wilhelm's abductor forced her into her car from behind, but she turned around to look at who was pushing her. When she did so, she got a close-up, unobstructed view of her abductor. His face was only inches from hers, and he wore no mask or other disguise. (RR45: 100-06; RR53: 132-33, 173). It was only after this face to face confrontation that Ms. Wilhelm's abductor made her kneel on the floorboard and put her face down in the front passenger seat. Moreover, she was in the car with him for approximately thirty minutes. During that time, she gradually sat upright in the passenger seat, and her abductor did nothing further to obstruct her view of him. (RR45: 103, 106; RR53: 137-38, 141, 145). Thus, Ms. Wilhelm had ample time and opportunity to closely observe her abductor.

Degree of Attention

Moreover, Ms. Wilhelm was not a casual observer, but a victim. She was kidnapped, and her abductor became enraged, choked her, and threatened to strike her. She so greatly feared for her life that she jumped from the vehicle even though it was

traveling between thirty and forty miles an hour. (RR45: 100-04, 125; RR53: 135-39). Certainly, the personal and emotionally charged nature of this crime heightened Ms. Wilhelm's sense of awareness. *See Cantu v. State*, 738 S.W.2d 249, 253 (Tex. Crim. App. 1987) (high degree of attention indicated by fact that witness was not casual observer but victim of armed robbery awakened by jabs from rifle).

Ms. Wilhelm's attentiveness is evident in the detailed description she gave of her abductor. She described his sex, age, race, height, weight, build, eye color, hair color, hair length and style, facial hair, jewelry, and clothing. (RR45: 145-47; RR53: 97). Then a week after her kidnapping, she helped the police create a composite sketch of her abductor that further detailed his facial features. (RR45: 131-35, 141-43; RR53: 98-99; State's Exhibit 141). *See Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993) (witness' detailed description indicated she was very attentive when looking at the suspect).

Accuracy of Prior Description

Ms. Wilhelm's descriptions of her abductor were not just detailed but accurate. To the extent his features are discernible from the lineup, appellant resembles both Ms. Wilhelm's description of her abductor and the composite sketch. (State's Exhibits 141, 142). Appellant's lineup photograph shows no earring, but the record reflects that he has pierced ears. (RR53: 219-20). The record also reflects that, consistent with Ms. Wilhelm's description of a man in his early to mid-twenties, appellant was just days shy

of his twenty-second birthday on the date of the kidnapping (August 26, 1997).¹⁶ *See Ibarra v. State*, 11 S.W.3d 189, 196 (Tex. Crim. App. 1999) (reliability of identification supported by fact that witness' description of suspect's height, weight, clothing, race, and hair matched defendant's general appearance).

Level of Certainty at Confrontation

In addition, Ms. Wilhelm exhibited certitude in her identification of appellant as her abductor. When shown the lineup, Ms. Wilhelm looked at each subject from right to left, beginning with the top row, and when she reached appellant's photograph, she had a strong emotional reaction. According to Stanton, her facial expression changed, and she said, "Oh my God, I'm virtually sure . . ." in a quivering voice. (RR53: 103). *See Cantu*, 738 S.W.2d at 253 (reliability of witness' pretrial identification of defendant in photographic lineup supported by officers' testimony that witness appeared visibly shaken when he saw defendant's photograph in lineup). Also, Ms. Wilhelm confirmed that, when she viewed the lineup, it did not take her long to identify him and that she had no doubt when she saw his photograph. (RR45: 113-14). *See Brown*, 64 S.W.3d at 101 (witness' prompt and certain identification of defendant when shown lineup indicative of pretrial identification's reliability).

At trial, Ms. Wilhelm identified appellant in court as the man who abducted and assaulted her in 1997, and she stated that she had no doubt that he was her abductor. (RR53: 147-48). As appellant notes, Ms. Wilhelm did initially fail to identify him during

¹⁶ Appellant was born September 1, 1975. (Defense Exhibit 70A).

the pretrial hearing. However, she identified no one else in the courtroom during that hearing, and soonafter, she stated that but for his glasses, appellant looked like the man whose photograph she had seen on television. When appellant removed his glasses on the court's order, Ms. Wilhelm stated that she recognized him "from pushing her in the car." She explained that she had trouble identifying him in court because of his glasses; her abductor wore none. She also noted that appellant's hair was now longer, he wore no earring, and he was dressed differently. Once she saw him without his glasses, she had no doubt that he was the man who had abducted her in 1997. (RR45: 106-111; RR53: 157-58, 164-65). Thus, Ms. Wilhelm accounted for her initial failure to identify appellant in court. *See Cantu*, 738 S.W.2d at 253 (concluding evidence of witness' fear of defendant, whom he knew from neighborhood, adequately accounted for witness' failure to identify defendant first time he was shown lineup).

Time Between Crime and Confrontation

Although unnoted by appellant, the period of time between the kidnapping and Ms. Wilhelm's identification of appellant in the lineup was not brief. A little over three years elapsed between the date of the offense (August 26, 1997) and the date Ms. Wilhelm identified appellant in the lineup (November 3, 2000). But this three-year gap is neither overwhelming nor otherwise persuasive evidence that Ms. Wilhelm's identification of appellant was untrustworthy.

Ms. Wilhelm's memory of her abductor did not fade during that three-year period. Since the offense, Ms. Wilhelm has repeatedly and consistently described her abductor in great detail. She gave a detailed description to the police in 1997 while she was

hospitalized immediately after the offense and again a week later when she helped create the composite sketch. Then in 2001, almost four years after the offense, she gave this same detailed description in court, once during the pretrial hearing and again during the guilt phase of trial. *See Delk*, 855 S.W.2d at 706 (holding eighteen-month delay between crime and witness' identification of defendant's photograph did not detract from reliability of identification given witness's ability to repeatedly and consistently recall details).

As previously noted, appellant's appearance is consistent with Ms. Wilhelm's description of her abductor. Furthermore, she has never identified anyone other than appellant. In fact, early on in the investigation, when shown a lineup containing another suspect's picture, she refused to identify anyone. (RR53: 106-07, 161-62). *See Webb v. State*, 760 S.W.2d 263, 272 (Tex. Crim. App. 1988) (reliability of witness' identification of defendant supported by fact that witness viewed many photographs without showing any propensity to misidentify others); *Brown v. State*, 29 S.W.3d 251, 256 (Tex. App. – Houston [14th Dist.] 2000, no pet.) (witness' certainty that perpetrator's photograph not in lineup not containing defendant's photograph supports reliability of witness' subsequent identification of defendant).

Other Considerations

Appellant predicates his attack on the reliability of Ms. Wilhelm's identification of him largely on the fact that Ms. Wilhelm saw his photograph on television. Ms. Wilhelm saw a photograph of appellant once on television and once on the Dallas Morning News' website. (RR53: 151). Ms. Wilhelm testified, however, that she identified appellant in

the lineup and then again in court based on her recollection of him during the kidnapping. (RR45: 114-15; RR53: 165). *See Cantu*, 738 S.W.2d at 254 (reliability of witness' identification of defendant supported by witness' unwavering testimony that he picked defendant's photograph and identified him at trial because he remembered defendant from night of offense). These affirmations are supported by the fact that Ms. Wilhelm immediately recognized appellant despite the fact that the media coverage did not relate to her own kidnapping. (RR45: 136-37; RR53: 151).

Most importantly, however, the broadcast and publication of appellant's photograph was not the result of any action by the police to suggest appellant's identity as the perpetrator of any offense, much less Ms. Wilhelm's kidnapping. Thus, the constitutional sanction of inadmissibility is inapplicable, regardless of the extent, if any, to which Ms. Wilhelm's identification of him might have been rendered less reliable by her prior exposure to publicized photograph. *Rogers*, 774 S.W.2d at 260; *see also Craig*, 985 S.W.2d at 694.

Viewed in their totality, the surrounding circumstances show that the lineup viewed by Ms. Wilhelm was not impermissibly suggestive and that, even if so, her identification of him was nonetheless reliable. Therefore, this Court should overrule appellant's thirteenth point of error.

POINT 14: Denial of Extraneous Offense Instruction

Appellant contends the trial court erroneously denied his request for an instruction limiting the jury's consideration of extraneous offense evidence to the future

dangerousness special issue. (CR: 149; RR60: 2-3). Appellant argues that permitting the jury to consider his extraneous offenses in answering the mitigation special issue restricted the jury's ability to give effect to his mitigating evidence and, thus, violated his constitutional right to individualized sentencing. *See* U.S. CONST. amends. VIII & XIV. This Court has previously rejected such a complaint. *See Jackson v. State*, 992 S.W.2d 469, 478 (Tex. Crim. App. 1999).

As noted by this Court in *Jackson*, extraneous offense evidence has relevance beyond the future dangerousness issue. It is relevant to determine whether or not the mitigating circumstances offered are sufficient to warrant a life sentence. *Id.* Moreover, requiring the jury to look at mitigating evidence in a vacuum, i.e., excluding relevant aggravating circumstances from the mitigation determination, does not further an "individualized" assessment of punishment. If anything, it inhibits it. *Id.* (quoting *Mosley v. State*, 983 S.W.2d 249, 264 n.18 (Tex. Crim. App. 1998)).¹⁷ Therefore, the trial court properly refused to limit the jury's consideration of extraneous offense evidence to the future dangerousness issue, and this Court should overrule appellant's fourteenth point of error.

¹⁷ Footnote 18 of *Mosley* reads in part, "[T]he Supreme Court has never precluded the use of aggravating circumstances as part of the process of an individualized determination of culpability. Such a process could hardly be considered "individualized" if half of the equation (relevant aggravating circumstances) were excluded. . . . In determining whether to dispense mercy to a defendant after it has already found the eligibility factors in the State's favor, the jury is not, and should not be, required to look at mitigating evidence in a vacuum."

POINT 15: Denial of Instructions Defining Special Issue Terms

Appellant contends the trial court should have submitted punishment instructions defining the terms “probability,” “criminal acts of violence,” and “continuing threat to society” for the jury. Applicant argues that the failure to define these terms prevented a rational appellate review of the jury’s answer to the special issues and, thus, violated his rights under the Sixth, Eighth, and Fourteenth Amendments. U.S. CONST. amends. VI, VIII, XIV.

The omission of instructions defining these terms violated none of the asserted constitutional rights. The Court has repeatedly held that the terms “probability,” “criminal acts of violence,” and “continuing threat to society” require no special definitions. *See, e.g., Feldman*, 71 S.W.3d at 757. The terms are applied in “their usual acceptance in common language.” *Id.*

Furthermore, applicant’s complaint is grounded on the incorrect assertion that the special punishment issues in article 37.071 function as aggravating circumstances to circumscribe the class of persons eligible for the death penalty. However, the aggravating circumstances that determine death-eligibility are found in penal code section 19.03, including: murder of police officer or fireman, murder in the course of certain specified felonies, murder for remuneration, certain murders committed while incarcerated or escaping incarceration, multiple murders, and murder of a child. *See TEX. PENAL CODE ANN. § 19.03* (Vernon 1994); *Green v. State*, 912 S.W.2d 189, 196 (Tex. Crim. App. 1995) (Baird, J., concurring). These circumstances genuinely narrow the

class of death-eligible defendants and pass constitutional muster with respect to the “eligibility decision.” *Green*, 912 S.W.2d at 196.

The special punishment issues, on the other hand, permit the fact finder to further make an individualized determination as to the *appropriateness* of the death penalty. The future dangerousness issue allows the jury to consider the defendant’s character and record, as well as the circumstances of the offense, and has been approved by the United States Supreme Court. *Id.* at 197 (citing *Jurek v. State*, 428 U.S. 262 (1976)). The second mitigation issue ensures that the jury can give effect to all types of mitigating evidence. *See id.* Thus, the “selection decision” to be made by the jury pursuant to the issues in article 37.071 ensures an individualized determination and passes constitutional muster. *See id.*

In sum, the trial court’s refusal to provide the requested definitions poses no constitutional problems. *See Cantu v. State*, 842 S.W.2d 667, 691 (Tex. Crim. App. 1992) (rejecting assertion that judge should define “probability” and “criminal acts of violence”); *Caldwell v. State*, 818 S.W.2d 790, 798 (Tex. Crim. App. 1991) (rejecting assertion that judge should define continuing threat to “society”). Therefore, the Court should overrule appellant’s fifteenth point of error.

POINT 16: Constitutionality of 12/10 Rule

Appellant contends the Texas death penalty sentencing scheme violates his constitutional rights against cruel and unusual punishment and to due process of law. U.S. CONST. amends. VIII & XIV. Specifically, he maintains the ten-vote requirement

for the jury to return a “no” answer to the first special issue and a “yes” answer to the mitigation issue coerces minority “life” voters to vote with the majority in the belief that their vote is worthless without nine other jurors to join them. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(2), (f)(2) (Vernon Supp. 2002). He also contends, contrary to existing law, that the jury should be informed that the failure to agree with respect to either issue results in a life sentence. *See* TEX. CODE CRIM. P. ANN. art. 37.071, § 2(a)(1) (Vernon Supp. 2002) (jury may not be told the effect of a deadlock).

This Court has repeatedly decided these issues against appellant. *See Jackson v. State*, 33 S.W.3d 828, 832 (Tex. Crim. App. 2000); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996). In addition, the Supreme Court has held the Eighth Amendment does not require the jury to be instructed “as to the consequences of a breakdown in the deliberative process.” *See Jones v. United States*, 144 L.Ed.2d 370, 382-83 (1999).

Appellant complains nonetheless that the 12/10 rule acts as an improper dynamite charge in violation of *Mills v. Maryland*, 486 U.S. 367, 383 (1988). The jury charge in *Mills* was determined to be unconstitutional because it prevented the jury from acting on mitigating evidence unless it unanimously agreed a particular factor was mitigating, thereby essentially allowing a single juror to impose a death sentence. *See Mills*, 486 U.S. at 380. The charge in *Mills* violated the rule that the sentencer may not be prevented from considering, as a mitigating factor, all relevant evidence. *Id.* at 374-75.

Texas’ 12/10 rule has already been discussed in relation to *Mills* and upheld. *See Williams*, 937 S.W.2d at 490; *Rousseau v. State*, 855 S.W.2d 666, 687 n.26 (Tex. Crim.

App. 1993). The Texas statute allows a single juror to give effect to any piece of mitigating evidence by voting “no” on any special issue. *Id.* The jury was told specifically that they need not agree on what particular evidence supports a negative answer to special issue one or an affirmative answer to special issue two. (CR: 205-06).

It is true that the jury is instructed that they may not answer the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer. (CR: 205-06). But the charge also informs the jurors that, in order to vote “yes” to special issue one and “no” to special issue two, i.e., vote for the death penalty, they must do so unanimously. (CR: 205-06, 213). Under these facts, appellant’s argument that jurors will be misled lacks merit because every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on both special issues. *See Lawton v. State*, 913 S.W.2d 542, 559 (Tex. Crim. App. 1995). While the jury is not informed of the consequences of a hung jury, each juror will know that, without his or her vote, the death sentence cannot be imposed. *Id.*

In sum, appellant’s attack on the constitutionality of the 12/10 rule is meritless. Therefore, the Court should overrule appellant’s sixteenth point of error.

POINTS 17 & 18: Constitutionality of Texas Death Penalty Scheme

Appellant contends the Texas death penalty scheme violates his rights to due process and the proscription against cruel and unusual punishment because it is impossible to simultaneously restrict the jury’s discretion to impose the death penalty while allowing the jury unlimited discretion to consider mitigating evidence.

Appellant's attack on the constitutionality of the Texas death penalty scheme is meritless. Appellant relies on Justice Blackmun's dissent in *Callins v. Collins* and urges this Court to declare the state scheme unconstitutional. *See Callins v. Collins*, 510 U.S. 1141 (1994). The Court has repeatedly rejected this very same contention. *See, e.g., Turner v. State*, No. 73,559, 2002 Tex. Crim. App. LEXIS 153, at *16-17 (Tex. Crim. App. Sept. 11, 2002). Appellant does not attempt to distinguish his case from this precedent, challenge the reasoning in existing case law, or assert any new or different arguments. Therefore, the Court should overrule appellant's seventeenth and eighteenth points of error.

POINTS 19 & 20: Cumulative Constitutional Error

Appellant asks this Court to consider the cumulative effect of the multiple constitutional errors claimed above. He asserts that, considered together, they denied him due process of law and due course of law under the federal and state constitutions.

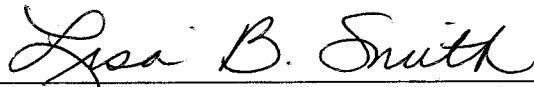
The Court has recognized the proposition that a number of errors may be found harmful in their cumulative effect. *See Chamberlain*, 998 S.W.2d at 238. Applicant has demonstrated no constitutional violations, however. Moreover, he fails to specify how any of the alleged errors combine to create a due process violation. He simply asks this Court to consider their cumulative effect. Because there are no errors and, thus, no harm to "cumulate," applicant's claim must fail. *See Turner*, 2002 Tex. Crim. App. LEXIS at *17 (rejected cumulative constitutional error complaint where Court found no

constitutional violation). For these reasons, this Court should overrule appellant's nineteenth and twentieth points of error.

PRAYER

The State prays this Honorable Court will affirm the judgment of the trial court.

Respectfully submitted,



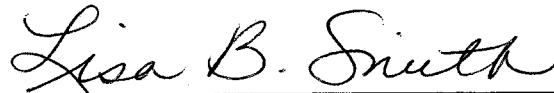
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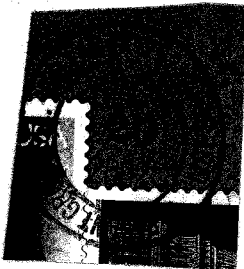
CERTIFICATE OF SERVICE

The State mailed a copy of this brief to Adam L. Seidel, attorney for appellant, Chateau Plaza, Suite 1400, 2515 McKinney Avenue, Dallas, Texas 75201, on December 19, 2002.

The State mailed a copy of this brief to Matthew Paul, State Prosecuting Attorney, P.O. Box 12405, Capitol Station, Austin, Texas 78711, on December 19, 2002.



Lisa Braxton Smith



74145

NO. 74,145
IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

JEDIDIAH ISSAC MURPHY,
APPELLANT

FILED IN
COURT OF CRIMINAL APPEALS

JUN 27 2002

VS.

Troy C. Bennett, Jr., Clerk

THE STATE OF TEXAS,
APPELLEE

On Appeal From the 194th Judicial District Court
of Dallas County, Texas

Trial Court Cause No. F00-02424-NM

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IDENTITY OF PARTIES AND COUNSEL

This case is an appeal from a criminal conviction and therefore the only parties are the Appellant, JEDIDIAH ISSAC MURPHY, by and through his attorneys of record in the trial court, THE HONORABLE JANE RODEN, Chief Public Defender for Dallas County, along with Assistant Public Defenders at trial, JANE LITTLE, MICHAEL BYCK, and JENNIFER BALIDO, 133 N. Industrial Blvd., Dallas, Texas 75207; and Appellant's attorney on appeal, ADAM L. SEIDEL, Chateau Plaza, Suite 1400, 2515 McKinney Avenue, Dallas, Texas 75201; and the State of Texas, by and through WILLIAM T. "BILL" HILL, Criminal District Attorney of Dallas County, Texas, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB-19, Dallas, Texas 75207-4313, along with Assistant District Attorneys at trial, GREG DAVIS and MARY MILLER.

TABLE OF CONTENTS

| | <u>PAGE</u> |
|--------------------------------------|-------------|
| IDENTITY OF PARTIES AND COUNSEL..... | i |
| INDEX OF AUTHORITIES..... | ix |
| STATEMENT OF THE CASE..... | 2 |
| POINTS PRESENTED..... | 3 |

POINT OF ERROR NO. 1

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

POINT OF ERROR NO.2

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO ARTICLE I, SECTION 10 OF THE TEXAS CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

POINT OF ERROR NO. 3

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF ARTICLE 35.16 OF THE CODE OF CRIMINAL PROCEDURE WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

POINT OF ERROR NO.4

THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

POINT OF ERROR NO. 5

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER PHILLIP MAY. (R.XVII, 99-101).

POINT OF ERROR NO. 6

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER JOHN ROBUCK. (R.XVIII,47-53).

POINT OF ERROR NO. 7

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER THOMAS BROOKS. (R.XXVIII,49-52).

POINT OF ERROR NO. 8

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER KIMBERLY WILLIAMS. (R.XXXVII,146-148&180-184).

POINT OF ERROR NO.9

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN VOIR DIRE WHERE TRIAL COUNSEL USED PEREMPTORY STRIKES AGAINST TWO VENIREMEMBERS WHOM COUNSEL ERRONEOUSLY BELIEVED HAD BEEN UNSUCCESSFULLY CHALLENGED FOR CAUSE. (R.XXXVII,135), (R.XLV,45-48&51),(R.XLIV,13-14).

POINT OF ERROR NO. 10

THIS APPEAL SHOULD BE ABATED UNTIL THE TRIAL COURT FILES FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY TEX. CODE CRIM. PRO. ARTICLE 38.22, §6.

POINT OF ERROR NO.15

THE TRIAL COURT ERRED IN FAILING TO SUBMIT IN THE JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DEFINITIONS OF THE VAGUE, UNDEFINED TERMS USED IN THE SPECIAL ISSUES THAT EFFECTIVELY DETERMINE THE DIFFERENCE BETWEEN A LIFE SENTENCE AND IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 16

THE TEXAS DEATH PENALTY SCHEME VIOLATED APPELLANT'S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REQUIRING AT LEAST TEN "NO" VOTES FOR THE JURY TO RETURN A NEGATIVE ANSWER TO THE PUNISHMENT SPECIAL ISSUES.

POINT OF ERROR NO. 17

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE PROCESS OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 18

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE COURSE OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE 1, SECTIONS 13 AND 19, OF THE TEXAS CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 19

THE CUMULATIVE EFFECT OF THE ABOVE-ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

POINT OF ERROR NO. 20

THE CUMULATIVE EFFECT OF THE ABOVE-ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE COURSE OF LAW UNDER ARTICLE 1, SECTION 19, OF THE TEXAS CONSTITUTION.

| | |
|-------------------------------------|----|
| STATEMENT OF FACTS..... | 8 |
| SUMMARY OF THE ARGUMENTS..... | 14 |
| POINT OF ERROR NO. 1, RESTATED..... | 26 |
| POINT OF ERROR NO. 2, RESTATED..... | 32 |
| POINT OF ERROR NO. 3, RESTATED..... | 33 |

| | |
|---|-----------|
| <i>Johnson v. State,</i> 982 S.W.2d 403 (Tex. Crim. App.1998)..... | 28 |
| <i>Jurek v. Texas,</i> 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)..... | 88,94 |
| <i>Keeton v. State,</i> 724 S.W.2d 58 (Tex. Crim. App.1987)..... | 88 |
| <i>Knight v. State,</i> 839 S.W.2d 505 (Tex. App.--Beaumont 1992, no pet.)..... | 70 |
| <i>Lagrone v. State,</i> 942 S.W.2d 602 (Tex. Crim. App. 1997)..... | 52 |
| <i>Lewis v. Jeffers,</i> 497 U.S. 766, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)..... | 92 |
| <i>Lisenba v. California,</i> 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166, __ (1941)..... | 104 |
| <i>Lockett v. Ohio,</i> 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)..... | 88-90,101 |
| <i>Loserth v. State,</i> 963 S.W.2d 770 (Tex. Crim. App.1998)..... | 84 |
| <i>Lowenfield v. Phelps,</i> 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988)..... | 96,97 |
| <i>Marquez v. State,</i> 725 S.W.2d 217 (Tex. Crim. App. 1987)..... | 87 |
| <i>Maryland v. Cartwright,</i> 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)..... | 92,93 |
| <i>McLeskey v. Kemp,</i> 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)..... | 102 |
| <i>Mills v. Maryland,</i> 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)..... | 96-98 |

| | |
|---|-------|
| <i>Mowbray v. State</i> , 788 S.W.2d 658 (Tex. App.--Corpus Christi 1990), <i>cert. denied</i> , 498 U.S. 1101, 111 S.Ct. 999, 112 L.Ed.2d 1082 (1991)..... | 60 |
| <i>Neil v. Biggers</i> , 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)..... | 85 |
| <i>Nunfio v. State</i> , 808 S.W.2d 482 (Tex. Crim. App.1991)..... | 27 |
| <i>O'Brien v. U.S.</i> , 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967)..... | 76 |
| <i>Ott v. State</i> , 627 S.W.2d 218 (Tex. App. - Ft. Worth 1982, <i>pet. ref'd</i>)..... | 76 |
| <i>Penry v. Lynaugh</i> , 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)..... | 103 |
| <i>Powell v. State</i> , 898 S.W.2d 821(Tex. Crim. App. 1994)..... | 87 |
| <i>Reese v. State</i> , 877 S.W.2d 328 (Tex. Crim. App. 1994)..... | 104 |
| <i>Roney v. State</i> , 632 S.W.2d 598 (Tex. Crim. App. 1982)..... | 93 |
| <i>Rosales v. State</i> , 4 S.W.3d 228 (Tex. Crim. App.1999)..... | 70 |
| <i>Shipley v. State</i> , 790 S.W.2d 604 (Tex. Crim. App.1990)..... | 32 |
| <i>Simmons v. United States</i> , 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)..... | 84,86 |
| <i>Sixta v. State</i> , 875 S.W.2d 17 (Tex.App.--Houston [1st Dist.] 1994, <i>pet. ref'd</i>)..... | 80 |

| | |
|---|-------|
| <i>Skipper v. South Carolina</i> , 476 U.S. 1, (1986)..... | 89,90 |
| <i>Smith v. State</i> , 703 S.W.2d 641 (Tex. Crim. App.1985)..... | 27 |
| <i>Smith v. State</i> , 779 S.W.2d 417 (Tex. Crim. App.1988)..... | 93 |
| <i>Standefer v. State</i> , 59 S.W.3d 177 (Tex. Crim. App. 2001)..... | 28,30 |
| <i>State v. Williams</i> , 392 So.2d 619 (La. 1980)..... | 97 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 70,71 |
| <i>Thompson v. State</i> , 9 S.W.3d 808 (Tex. Crim. App.1999)..... | 71 |
| <i>Tong v. State</i> , 25 S.W.3d 707 (Tex. Crim. App.2000)..... | 70 |
| <i>Tuilaepa v. California</i> , 512 U.S. 967 (1994)..... | 89 |
| <i>U. S. v. Levy</i> , 577 F.2d 200 (3rd Cir. 1978)..... | 76 |
| <i>U. S. v. Rosner</i> , 485 F.2d 1213 (2nd Cir. 1973)..... | 76 |
| <i>U. S. v. Zarzour</i> , 432 F.2d 1 (5th Cir. 1970)..... | 76 |
| <i>Vuong v. State</i> , 830 S.W.2d 929 (Tex. Crim. App.), <i>cert. denied</i> , 506 U.S. 997, 113 S. Ct. 595, 121 L. Ed. 2d 533 (1992)..... | 33 |

| | |
|--|----|
| <i>Walton v. Arizona</i> , 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed2d 511 (1990)..... | 92 |
| <i>Weeks v. Angelone</i> , 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000)..... | 89 |
| <i>Witherspoon v. Illinois</i> , 391 U.S. 519 (1969)..... | 48 |
| <i>Zant v. Stephens</i> , 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)..... | 92 |

CONSTITUTIONS

| | |
|-------------------------------|-------|
| TEX. CONST. art. I, § 10..... | 51 |
| U.S. CONST. Amend. XIV..... | 48,49 |

STATUTES

| | |
|---|-------|
| TEX. CODE CRIM. PRO. article 3.01..... | 63 |
| TEX. CODE CRIM. PRO. article 13.07..... | 80 |
| TEX.CODE CRIM. PROC. article 13.18..... | 80 |
| TEX. CODE CRIM. PRO. article 35.16(b)(3)..... | 33 |
| TEX. CODE CRIM. PRO. art. 35.16(c)(2)..... | 30,52 |
| TEX. CODE CRIM. PROC. art.37.071..... | 45,86 |
| TEX. CODE CRIM. PRO. art. 37.071, §2(b)..... | 29,95 |

OTHERS

| | |
|---|-----|
| <i>Black's Law Dictionary</i> 1081 (5th ed. 1979)..... | 63 |
| Gillers, <i>Deciding Who Dies</i> , 129 U.Pa.L.Rev. 1 (1980)..... | 103 |
| <i>Webster's New Collegiate Dictionary</i> (1980)..... | 63 |

NO. 74,145

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

BRIEF FOR THE APPELLANT

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant Jedidiah Issac Murphy respectfully submits this Appellant's Brief in the above styled and numbered case. Appellant currently stands convicted in the trial court, in Cause Number F00-02424-NM, for the offense of capital murder, a capital felony, on appeal from the 194th Judicial District Court of Dallas County, Texas, the Honorable F. Harold Entz, Jr. presiding.

STATEMENT OF THE CASE

Appellant was charge by indictment with capital murder in violation of TEX. PENAL CODE §19.03(a)(2). The indictment alleged that the offense occurred on or about October 4, 2000. (C.I,2).¹ A jury found Appellant guilty of capital murder as charged in the indictment. (C.I,189). At the punishment phase, the jury was charged pursuant to TEX. CODE CRIM. PROC. ANN. Art. 37.071, § 2(b)(1), (b)(2), (e). The jury answered special issue number one in the affirmative, and further found no mitigating circumstances that warranted imposition of a sentence of life rather than death. (C.I,214). On June 30, 2001, the trial court entered judgment imposing the death penalty. (C.I,215). Appeal to this Court is automatic pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071, §2(h).

¹As used in this brief, "C.I-IV" refers to the Clerk's Record, of which there are four volumes. "R.I-LXV" refers to the reporter's record and exhibits, volumes one through sixty-five. The specific page number is then noted.

POINTS PRESENTED

POINT OF ERROR NO. 1

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

POINT OF ERROR NO.2

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO ARTICLE I, SECTION 10 OF THE TEXAS CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

POINT OF ERROR NO. 3

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF ARTICLE 35.16 OF THE CODE OF CRIMINAL PROCEDURE WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

POINT OF ERROR NO.4

THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

POINT OF ERROR NO. 5

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER PHILLIP MAY. (R.XVII, 99-101).

POINT OF ERROR NO. 6

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER JOHN ROBUCK. (XVIII, 47-53).

POINT OF ERROR NO. 7

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER THOMAS BROOKS. (R.XXVIII,49-52).

POINT OF ERROR NO. 8

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER KIMBERLY WILLIAMS. (RXXXVII,146-148&180-184).

POINT OF ERROR NO.9

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN VOIR DIRE WHERE TRIAL COUNSEL USED PEREMPTORY STRIKES AGAINST TWO VENIREMEMBERS WHOM COUNSEL ERRONEOUSLY BELIEVED HAD BEEN UNSUCCESSFULLY CHALLENGED FOR CAUSE. (R.XXXVII,135), (R.XLV,45-48&51),(R.XLIV,13-14).

POINT OF ERROR NO. 10

THIS APPEAL SHOULD BE ABATED UNTIL THE TRIAL COURT FILES FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY TEX. CODE CRIM. PRO. ARTICLE 38.22, §6.

POINT OF ERROR NO. 11

APPELLANT RIGHTS PURSUANT TO THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE INFRINGED WHERE THE TRIAL PROSECUTORS EXAMINED LETTERS AND NOTES WRITTEN BY APPELLANT TO HIS TRIAL ATTORNEYS, WHICH THE TRIAL COURT JUDGE DETERMINED WERE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

POINT OF ERROR NO. 12

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT VENUE FOR THE OFFENSE WAS WITHIN THE BOUNDARIES OF DALLAS COUNTY. (C.I,179-180) (R.L,22) (R.LII,2).

POINT OF ERROR NO. 13

THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUEST TO SUPPRESS THE UNDULY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT MADE BY COMPLAINANT SHERRYL WILHELM, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

POINT OF ERROR NO. 14

THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION WHICH WOULD HAVE REQUIRED THE JURY TO CONSIDER EXTRANEOUS OFFENSES ONLY FOR THE PURPOSE OF DETERMINING FUTURE DANGEROUSNESS IN SPECIAL ISSUE NUMBER ONE.

POINT OF ERROR NO. 15

THE TRIAL COURT ERRED IN FAILING TO SUBMIT IN THE JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DEFINITIONS OF THE VAGUE, UNDEFINED TERMS USED IN THE SPECIAL ISSUES THAT EFFECTIVELY DETERMINE THE DIFFERENCE BETWEEN A LIFE SENTENCE AND IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 16

THE TEXAS DEATH PENALTY SCHEME VIOLATED APPELLANT'S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REQUIRING AT LEAST TEN "NO" VOTES FOR THE JURY TO RETURN A NEGATIVE ANSWER TO THE PUNISHMENT SPECIAL ISSUES.

POINT OF ERROR NO. 17

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE PROCESS OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 18

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE COURSE OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE I, SECTIONS 13 AND 19, OF THE TEXAS CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 19

THE CUMULATIVE EFFECT OF THE ABOVE-ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

POINT OF ERROR NO. 20

THE CUMULATIVE EFFECT OF THE ABOVE
ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED
APPELLANT DUE COURSE OF LAW UNDER ARTICLE 1,
SECTION 19, OF THE TEXAS CONSTITUTION.

STATEMENT OF FACTS

The Appellant was twenty-six years old at the time of trial. (R.XLVII,243). The complainant, Bertie Cunningham was 80 years old at the time of the offense. (R.XLVII,22-24). On October 4, 2000, she went to Collin Creek Mall in Plano, Texas. (R.XLVII,25-26). She left home and was expected to return at approximately 3:00 p.m.. When Bertie did not return by 4:00 pm, her sister called the Garland Police Department, and later canceled all her Bertie's credit cards except for one. While calling the credit card companies, it was discovered that an unauthorized charge had already been made at an area bicycle shop. (R.XLVII,32-35).

Meanwhile, a videotape from the J. C. Penney's at Collin Creek Mall showed the complainant arriving at the store at approximately 2:10 p.m. (R.XLVII,38-39). Additionally, a receipt indicated that the complainant made a purchase at 2:55 p.m.. (R.XLVII,43-47).

Later that day, there was an unsuccessful attempt to use one of Cunningham's credit card to withdraw cash from an ATM machine, resulting in a report being forwarded to the credit card company used in the attempt. (R.XLVII,58-67). The credit card company reported that the user was unsuccessful because the wrong personal identification number was used.

(R.XLVII,148-150). Records also showed another attempt to withdraw cash later in the day at a different ATM location on Harry Hines in Dallas. On the following day, Cunningham's card was again unsuccessfully used at a Bank One location on Harry Hines in Dallas. The card was then successfully used twice at "Chacho's" located in Terrell, Texas.

Meanwhile, Appellant was identified as the using the complainant's credit card at Richardson Motor Sports to purchase motorized skate-boards called "Go-Peds"(R.XLVII,121-125). In fact, Appellant signed his true name to the receipts and warranty documents. (R.XLVII,126). After the purchases, the Go-Peds were loaded into the back seat of a silver Honda which appeared the same as the one owned by Bertie Cunningham. (R.XLVII,135-136). When Appellant purchased the "Go-Peds, he was with fourteen-year-old Zach Mamot and Zach's friend, Ryan Hammonds.

Garland Police Detective Matt Myers was the lead detective in the case. Myers traveled to Colin Creek Mall because that was the last location where the complainant had been seen. He then traveled to the Richardson Motor Sports because he received information that one of the complainant's credit cards had used at that location. At Richardson Motor Sports, he obtained receipts for the purchases made by Appellant and developed Appellant's name as a suspect in the case. He later went to Edgewood, Texas because the complainant's car had been located at Ora Mae Milton's home which was in that area. After meeting with various law enforcement officers at the local Dairy Queen, Myers went to Milton's home where the complainant's car was parked.

Gary Rose of the Edgewood Police Department entered Ora Mae Milton's house,

awakened Appellant, and placed him in handcuffs. (R.XLVIII,77-79). After a short conversation with Appellant, Rose examined the complainant's silver Honda parked in front. He opened the trunk of the car after noticing blood on the rear bumper. Rose noticed a strong odor consistent with blood inside the truck. (R.XLVIII,81-83). It was later determined that the complainant's DNA matched blood samples taken from inside the trunk area. (R.XLIX,165-170). Rose recalled that when speaking with Appellant, Appellant lowered his head and said "it was an accident, I didn't mean to shoot her." (R.XLVIII,124-125). Latent fingerprints were later recovered from inside and outside the complainant's car and from various pieces of paper found inside the Honda. All of the recovered latent fingerprints matched Appellant. (R.XLIX,127-129).

Jason Bonham was a police officer who had been classmates with Appellant. Bonham offered to help arrest Appellant since they had been friends in school. (R.L,62-64). After Appellant was handcuffed, Bonham spoke with him in the bedroom in an attempt to determine the location of the complainant's body. Bonham reminded Appellant of a mutual friend who had committed suicide and whose body had been destroyed by animals prior to being discovered. Bonham mentioned that people would want to know where the body was before that could happen. Appellant began crying and told Bonham where the complainant was located. (R.L,69-71). Appellant also told Bonham that the shooting was an accident, stating that the gun "just went off." (R.L,74). The complainant's body was located approximately two miles from Milton's home in an area known as Livingston Creek. (R.XLVIII,87-90). The complainant's body was recovered was in Van Zandt county.

(R.XLVIII,123). She had suffered a single gun shot wound to right portion of the forehead. (R.XLIX,42). Gunpowder residue indicated that the barrel of the gun was lightly touching the skin when the gun fired. (R.XLIX,44). A single .22 caliber bullet was recovered during autopsy. (R.XLIX,65-66). The cause of death was the single gun shot wound. (R.XLIX,53-54).²

Appellant was taken to the Edgewood Police Department where Justice of the Peace Ozelle Wilcoxson arraigned Appellant on charges of credit card abuse and murder. Judge Wilcoxson advised Appellant of his "Miranda Rights." Later, Appellant agreed to go to a nearby creek area to assist in locating the weapon. (R.XLVIII,153-157). After leaving the creek area, Appellant was driven 45 minutes to the Garland Police Department where he was taken to an interview room where he again received his Miranda warnings. (R.XLVIII,158-162). After the warnings, Appellant indicated he wanted to cooperate. After a short time, Appellant was taken from the Garland Police Department and driven around in an attempt to ascertain the location where the complainant was abducted, however, Appellant was not able to identify the location where the abduction occurred. (R.XLVIII,170-173). Although they drove Appellant around to several locations in Dallas county, they were unable to establish any location in Dallas County where the Appellant abducted the complainant. Additionally, they were unable to establish any location within Dallas County where the

² Dr. Nizam Peerwani, who was employed as a medical examiner for Tarrant, Parker and Denton counties, believed that the complainant likely lost consciousness quickly after suffering the gunshot wound. (R.L,104-5&112).

complainant was shot. (R.XLVIII,210-211). Upon returning to the Garland Police Department, Appellant gave a written voluntary statement. (R.XLVIII,174-182). In Appellant's written statement, he indicated that after leaving Bleacher's Bar, he was walking towards highway 635 intending to hitch-hike to Wills Point when he encountered the complainant and asked for a ride. The complainant agreed and after some distance, they pulled into a parking lot. Appellant told the complainant he was putting her in the trunk and that he would later call police and notify them. While placing her in the trunk, Appellant held a gun in his right hand and switched hands because he had impaired use of his left hand and needed his right hand to close the trunk. As he reached for the trunk lid, he grabbed the gun with his left hand too hard and the gun went off accidentally, shooting the complainant. (R.XLVIII,183-184). Det. Myers described that Arapaho is the road leading from Bleacher's Bar to 635, and is located in Garland. The area from Bleacher's south to 635 is located within the boundaries of Dallas County, Texas. (R.XLVIII,184-186).

Det. Myers interviewed Appellant again after Appellant met with two of his trial lawyers, Jane Little and Michael Byck. Myers had Appellant initial new Miranda warnings which included five additional questions written onto the Miranda warning sheet. Those questions included, in general, whether Appellant had met with lawyers and he responded yes and whether the lawyers advised him not to talk to police officers, and Appellant responded no. Finally, Myers had Appellant initial indicating that the lawyers advised Appellant to cooperate with police officers. (R.XLVIII,257-258).

Edward Hueske was forensic scientist on the faculty of the University of North Texas

in Denton in the Department of Criminal Justice. He was also a training coordinator for the University of North Texas Policy Academy in Denton, a regional police training facility for police recruits. Part of the training he conducted was in training officers to avoid unintentional discharges of firearms. (R.L,90-92). One cause of accidental discharge is called "sympathetic firing," which can occur when a person holding the weapon carries out some manipulation with the other hand, such as grabbing, squeezing, shoving, or pushing, which can cause the other hand holding the gun to simultaneously squeeze the trigger, causing an unintentional discharge. Because of sympathetic discharge, police officers are specifically taught not to carry out a manipulation with one hand while holding their weapon with their finger on the trigger in the other. (R.L,91-95).

SUMMARY OF THE ARGUMENTS

1. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. Appellant sought to ask prospective jurors whether they could follow the law applicable to the punishment phase of a death penalty case, by requiring that the State prove future dangerousness notwithstanding evidence of the victim's good character. Pursuant to this Court's recent ruling in *Standefer*, Appellant's proposed questions asked simply whether the prospective jurors could follow the law. Appellant did not inject specific facts into the analysis, nor did the proposed question seek to commit the jurors to a specific outcome on the basis of certain facts. An answer by a prospective juror indicating that evidence of the victim's character would cause the juror to not require proof of future dangerousness beyond a reasonable doubt would have constituted proper grounds for a challenge for cause pursuant to TEX. CODE CRIM. PRO. art. 35.16(c)(2). Appellant was denied the opportunity to ask a proper question, testing each prospective juror's ability to follow the law applicable to Special Issue No. 1. Harm is presumed because Appellant was denied the ability to intelligently exercise peremptory strikes, pursuant to *Caldwell v. State*. The trial court judgement should be reversed and the case remanded for a new trial.

2. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO ARTICLE I, SECTION 10 OF THE TEXAS CONSTITUTION BY LIMITING APPELLANT'S VOIR

DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. Here, Appellant asserts that the trial court precluded Appellant from asking a proper question, as set out in the previous Point of Error, and that the trial court thereby denied Appellant the right to counsel pursuant to the Texas Constitution. The trial court judgement should be reversed and the case remanded for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF ARTICLE 35.16 OF THE CODE OF CRIMINAL PROCEDURE WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. Here, Appellant argues that while veniremember Treat indicated that a future murder would satisfy the requirement of "future dangerousness" applicable to Special Issue Number One, the record plainly shows that she would not have absolutely required evidence of a future murder before she could answer "yes" to the Special Issue. Veniremember Treat did not clearly demonstrate a bias against this part of the law, as was present in *Drew*, where this Court held that evidence of a future murder is not required for an affirmative answer to the future dangerousness issue. The trial court abused its discretion in granting the State's challenge for cause. The trial court judgement should be reversed and the case remanded for a new trial.

4. THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF THE

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50). Here, Appellant asserts the same argument as that advanced in the preceding Point of Error and asserts that the trial court's abuse of discretion denied Appellant's due process rights pursuant to the Fourteenth Amendment to the United States Constitution. The trial court judgement should be reversed and the case remanded for a new trial.

5. THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER PHILLIP MAY. This prospective juror clearly indicated that in the event there were a conflict between the law contained in the Court's charge and the juror's view of God's law, the court's instructions would be disregarded in favor of God' law. Although the veniremember could not state a specific example of when a conflict may arise, May was clear that in the event there were in fact such a conflict, the court's instructions as to the law would be disregarded. Appellant's challenge for cause was denied, forcing Appellant to use a peremptory strike against this unqualified veniremember. Appellant exhausted his strikes, was denied additional strikes, and was thereby forced to accept an objectionable juror. The case should be reversed and the case remanded for a new trial.

6. THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER JOHN ROBUCK. This veniremember was clear in expressing his inability to consider a minimum sentence of five

years in a murder case. Appellant's challenge for cause was denied, forcing Appellant to use a peremptory challenge. Appellant was then forced to accept an objectionable juror. The trial court judgement should be reversed and the case remanded for a new trial.

7. THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER THOMAS BROOKS.

Appellant submitted this veniremember for cause on the basis that he considered "probability" of future violence to be satisfied upon proof of a "possibility." This acted to lessen the State's burden of proof as to the first Special Issue. The trial court abused its discretion in denying Appellant's challenge for cause. The trial court judgement should be reversed and the case remanded for a new trial.

8. THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER KIMBERLY WILLIAMS.

Again, Appellant submitted this veniremember for cause on the basis that she considered "probability" of future violence to be satisfied upon proof of a "possibility." This acted to lessen the State's burden of proof as to the first Special Issue. The trial court abused its discretion in denying Appellant's challenge for cause. The trial court judgement should be reversed and the case remanded for a new trial.

9. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN VOIR DIRE WHERE TRIAL COUNSEL USED PEREMPTORY STRIKES AGAINST TWO VENIREMEMBERS WHOM COUNSEL ERRONEOUSLY

BELIEVED HAD BEEN UNSUCCESSFULLY CHALLENGED FOR CAUSE. Appellant's trial counsel exhausted all peremptory strikes and the trial judge denied Appellant's request for additional strikes, forcing Appellant to accept two objectionable jurors. However, counsel struck two veniremembers whom counsel incorrectly believed had been challenged for cause. As to one veniremember, not only does the record indicate that the veniremember was never challenged for cause, the record further shows the veniremember was favorable to the defense since he believed that "probability" of future violence required 70 to 80 percent proof. The record also shows that the other veniremember was never challenged for cause at all. Appellant argues that trial counsel's errors fell below the objective standard of reasonableness required by *Strickland* and cannot be dismissed simply as "trial strategy." Appellant was denied the effective assistance of counsel since voir dire is a critical stage and trial counsel essentially forced Appellant into accepting two objectionable jurors. The trial court judgement should be reversed and the case remanded for a new trial.

10. THIS APPEAL SHOULD BE ABATED UNTIL THE TRIAL COURT FILES FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY TEX. CODE CRIM. PRO. ARTICLE 38.22, §6. This Court granted Appellant's Motion To Abate and ordered the trial court to supplement the record with findings of fact and conclusions of law applicable to Appellant's Motion to Suppress the oral and written statements made by Appellant while in police custody. However, this Honorable Court denied Appellant's Motion to Extend the date for filing Appellant's Brief which sought to extend the deadline to a date after the record was properly supplemented. Counsel cannot adequately brief the

issues raised in Appellant's Motion to Suppress and Appellant's trial objections without the written findings. Therefore Appellant asserts that the entire appeal should be abated until the record is complete.

11. APPELLANT RIGHTS PURSUANT TO THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE INFRINGED WHERE THE TRIAL PROSECUTORS EXAMINED LETTERS AND NOTES WRITTEN BY APPELLANT TO HIS TRIAL ATTORNEYS, WHICH THE TRIAL COURT JUDGE DETERMINED WERE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE. Before trial, prosecutors examined personal writings made by Appellant which were protected by the attorney/client privilege. They gained access to the documents after the documents were seized by staff with the Dallas County Sheriff's Department. The trial prosecutors did not first seek a search warrant, nor did they first tender the documents to the trial court for an *in camera* inspection, despite the fact some documents were obviously attorney/client communication. The conduct by the trial prosecutors violated Appellant's due process rights and requires that the case be reversed and remanded for a new trial.

12. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT VENUE FOR THE OFFENSE WAS WITHIN THE BOUNDARIES OF DALLAS COUNTY. Here, Appellant argues that the trial court's objections related to venue were sufficient to preserve the issue for appeal, and that the trial court erred in allowing the jury to find venue in several different ways beyond the venue statute applicable to a homicide case. Had the trial court instructed the jury only on venue applicable in a murder case, the evidence would have been

insufficient to prove venue in Dallas County, even by a preponderance of the evidence. Article 13.07 of the Code of Criminal Procedure, applicable in a murder case, would have required that the State prove the county where either the complainant was injured, where she died, or where the body was found. The only proof offered by the State was that her body was found in another county. Based on the insufficient proof of venue, the case should be reversed and remanded for a new trial.

13. THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUEST TO SUPPRESS THE UNDULY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT MADE BY COMPLAINANT SHERRYL WILHELM, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION. Here, Appellant argues that the trial court abused its discretion in denying Appellant's trial objection to a photographic lineup offered by the State to prove Appellant committed an extraneous kidnapping offense years before the instant offense. The complainant in the extraneous offense testified outside the presence of the jury and failed to identify Appellant in open court. Later, in front of the jury, the witness did identify Appellant and the State was allowed to bolster her identification with a photographic lineup which was unduly suggestive since the photographs included suspects of races different than Appellant. Considering the factors set out in *Biggers*, admission of the photographic line up in this case constituted an abuse of discretion. The trial court judgement should be reversed and the case remanded for a new trial.

14. THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION WHICH WOULD HAVE REQUIRED THE JURY TO CONSIDER EXTRANEOUS OFFENSES ONLY FOR THE PURPOSE OF DETERMINING FUTURE DANGEROUSNESS IN SPECIAL ISSUE NUMBER ONE. In *Jurek v. Texas*, the Supreme Court noted the significance of the jury's ability to consider and give effect to mitigation evidence applicable to the second special issue. Appellant's trial counsel asserted that the jury should have been instructed that evidence of extraneous offenses be considered only for purposes of determining the future dangerousness question presented by the first special issue, and that the trial court's failure to restrict consideration of the extraneous offense evidence precluded the jury from considering and giving effect to Appellant's mitigation evidence of his childhood abuse and abandonment by his mother. The case should be reversed and remanded.

15. THE TRIAL COURT ERRED IN FAILING TO SUBMIT IN THE JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DEFINITIONS OF THE VAGUE, UNDEFINED TERMS USED IN THE SPECIAL ISSUES THAT EFFECTIVELY DETERMINE THE DIFFERENCE BETWEEN A LIFE SENTENCE AND IMPOSITION OF THE DEATH PENALTY. THE TRIAL COURT ERRED IN FAILING TO SUBMIT IN THE JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DEFINITIONS OF THE VAGUE, UNDEFINED TERMS USED IN THE SPECIAL ISSUES THAT EFFECTIVELY DETERMINE THE DIFFERENCE BETWEEN A LIFE SENTENCE AND IMPOSITION OF THE DEATH PENALTY. At the conclusion of the punishment phase, the

trial court submitted to the jury the special issues concerning Appellant's future dangerousness, and the existence of mitigating circumstances to prevent imposition of the death penalty. The trial court, however, failed to define certain critical terms appearing in these questions, namely, "probability" and "criminal acts of violence." This failure to define the operative words and phrases violated the constitutional requirement that each statutory aggravating circumstance genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of our most severe penalty. Because of the trial court's failure to charge the jury in a constitutionally adequate manner so that its determinations are rationally reviewable, there was no rational process justifying the imposition of the death sentence upon Appellant in comparison to other defendants' cases in which a life sentence has been imposed. This failure to properly instruct the jury violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, the vague and undefined terms incorporated in the second special issue invalidate the Texas death penalty scheme. As a result, Appellant is entitled to a new trial at which the court defines this language.

16. THE TEXAS DEATH PENALTY SCHEME VIOLATED APPELLANT'S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REQUIRING AT LEAST TEN "NO" VOTES FOR THE JURY TO RETURN A NEGATIVE ANSWER TO THE PUNISHMENT SPECIAL ISSUES. All twelve jurors must answer the future dangerousness issue affirmatively before

the trial court may impose the death penalty. A life sentence, on the other hand, requires that at least ten jurors answer a special issue negatively. Unanimity must also exist for the jury to enter a negative finding on the mitigation issue, while only ten jurors must vote to grant leniency. Neither the trial court, parties, nor counsel may disclose to the jury members that their failure to agree on an answer to any special issue results in a life sentence. A constitutional violation would occur under the Texas scheme if these instructions led reasonable jurors to believe that their votes in favor of a life sentence based on particular mitigating factors would be worthless unless at least nine other jurors joined them. Reasonable jurors in this case could have believed that they had no ability to give mitigating effect to any and all types of mitigating circumstances unless at least nine other jurors also voted for life. Because of the reasonable likelihood that the jury applied these instructions in a way that prevented the consideration of constitutionally relevant mitigating evidence, Appellant was sentenced to death in an unconstitutional manner. The judgment of the trial court should be reversed and the cause remanded for a new trial.

17. THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE PROCESS OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATHPENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE

DEATH PENALTY. The inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the federal constitution. The consistency and rationality required by due process are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness. The federal constitution, by requiring a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is both generously expanded and severely restricted. The federal constitution prohibits the imposition of the death penalty until someone designs a scheme capable of eliminating the sentencer's unbridled discretion to inflict death while simultaneously permitting unrestricted consideration of mitigating evidence. Consequently, this Court should commute Appellant's death sentence to imprisonment for life in the Institutional Division of the Texas Department of Criminal Justice.

18. THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE COURSE OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE I, SECTIONS 13 AND 19, OF THE TEXAS CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY. For the same reasons discussed in

Point of Error No.11, this Court should hold that the Texas constitution prohibits the imposition of the death penalty until creation of a scheme capable of eliminating the sentencer's unbridled discretion to inflict death while simultaneously permitting unrestricted consideration of mitigating evidence. This Court, as a result, should commute Appellant's death sentence to imprisonment for life.

19.THE CUMULATIVE EFFECT OF THE ABOVE- ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. Due process under the federal constitution requires that criminal defendants receive the fundamental fairness necessary to the due administration of justice. Appellant lists many constitutional and statutory violations in the preceding points of error. If this Court deems none of these reasons adequate to justify reversing the trial court's judgment, then please consider their cumulative effect. Constitutional breaches so permeated the voir dire and trial of Appellant's case so as to deprive him of the "fundamental fairness" implicit in the Fifth and Fourteenth Amendments. The trial court's judgment should thus be reversed, and the cause remanded for a new trial.

20.THE CUMULATIVE EFFECT OF THE ABOVE ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE COURSE OF LAW UNDER ARTICLE 1, SECTION 19, OF THE TEXAS CONSTITUTION. Due course of law under the state constitution requires that criminal defendants receive the fundamental fairness necessary to the due administration of justice. As discussed in Point of Error No. 13, Appellant requests

this Court consider the cumulative effect of these errors even if no one issue alone justifies reversal. Constitutional breaches so permeated the voir dire and trial of Appellant's case so as to deprive him of the "fundamental fairness" implicit in Article I, Section 19. Consequently, the trial court's judgment should be reversed, and the cause remanded for a new trial.

POINT OF ERROR NO.1, RESTATED

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

Appellant filed a pretrial motion related to the "future dangerousness" special issue, and the State's burden of proving beyond a reasonable doubt that Appellant would pose a future threat. Specifically, Appellant wanted to inquire of each potential juror as to whether the veniremember would follow the law by applying the applicable burden of proof despite evidence of the victim's good character.(C.II,385). In a pretrial hearing, Appellant stated the desire to specifically ask whether evidence of the victim's character would cause prospective jurors to lessen the State's burden of proof of beyond a reasonable doubt as to special issue number one, and further, whether the prospective juror could agree to follow the law and not lessen the State's burden of proof. (R.V,8-10). The State's objection was sustained and the

defense was prevented from asking the proposed questions. (R.V,10).

Applicable Law

A defendant's federal constitutional right to counsel requires that counsel be permitted to question the members of the jury panel in order to intelligently exercise peremptory challenges. U.S. CONST., amend VI.; *See also Smith v. State*, 703 S.W.2d 641, 643 (Tex. Crim. App.1985). When an appellant challenges a trial judge's limitation on the voir dire process, the reviewing court must analyze the claim under an abuse of discretion standard, the focus of which is whether the appellant proffered a proper question concerning a proper area of inquiry. *Caldwell v. State*, 818 S.W.2d 790, 793 (Tex. Crim. App.1991), *cert. denied*, 503 U.S. 990, 112 S.Ct. 1684, 118 L.Ed.2d 399 (1992); *Cockrum v. State*, 758 S.W.2d 577, 584 (Tex. Crim. App.1988), *cert. denied*, 489 U.S. 1072, 109 S.Ct. 1358, 103 L.Ed.2d 825 (1989). A proper question is one which seeks to discover a veniremember's views on an issue applicable to the case. *Caldwell v. State*, *supra* at 794; *Guerra v. State*, 771 S.W.2d 453, 468 (Tex. Crim. App.1988). The propriety of the question asked is determinative of the issue, and a question is proper if it seeks to discover a juror's views on an issue applicable to the case. *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex. Crim. App.1991); *Beaver v. State*, 736 S.W.2d 212, 214 (Tex. App.-Corpus Christi 1987, no pet.). Error in the denial of a proper question which prevents the intelligent exercise of counsel's peremptory challenges is an abuse of discretion and is not subject to a harm analysis. *Nunfio*, 808 S.W.2d at 485. If a proper question is disallowed, harm to the appellant is presumed because appellant has been denied the ability to intelligently exercise peremptory strikes. *Caldwell v. State*, *supra*.

Determining whether a voir dire question constitutes an “improper commitment” question requires two steps. First, is the question a commitment question, and if so, does the question include facts--and only those facts--that lead to a valid challenge for cause? If the answers are “yes” to the first and “no” to the second, the question is improper. *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001). “An attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts.” *Id.*, citing *Allridge v. State*, 850 S.W.2d 471, 480 (Tex. Crim. App. 1991), *cert. denied*, 510 U.S. 831, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993). Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact. A commitment question can also be a question that asks a prospective juror to refrain from resolving an issue on the basis of a fact that might be used to resolve the issue. *Standefer v. State*, 59 S.W.3d at 179. Not all commitment questions are improper. For example, questions concerning a juror's ability to consider the full range of punishment for a particular offense meet the definition of commitment questions but are nevertheless proper. *Id.* at 181(footnote and citations omitted). For example, determining whether jurors can consider probation in a murder case is proper since the inquiry commits a prospective juror to following the law by considering the applicable punishment options. Jurors, after all, are required to follow the law or be challengeable for cause. *Id.*, citing *Johnson v. State*, 982 S.W.2d 403, 405 (Tex. Crim. App. 1998). “The distinguishing factor is that the law requires jurors to make certain types of commitments. When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can

follow the law in that regard.” *Id.* (footnote omitted). The defense could also legitimately ask prospective jurors whether they could follow a law that requires them to disregard illegally obtained evidence, whether they could follow an instruction requiring corroboration of accomplice witness testimony, or whether they could follow a law that precludes them from holding against the defendant his failure to testify. These types of questions are proper since they test the prospective jurors' ability to follow the law applicable in the case. *Id.* In short, a commitment question is proper if one of the possible answers to the question gives rise to a valid challenge for cause. *Id.* at 182 (footnote omitted).

Analysis

In the punishment phase of a death penalty case, the State bears the burden of proving beyond a reasonable doubt that there is a probability the accused will commit further acts of violence that constitute a continuing threat. TEX. CODE CRIM. PRO. art. 37.071, §2(b). Here, the defense wanted to inquire whether prospective jurors could hold the state to its burden of proof notwithstanding the presence of evidence of the victim's character. Certainly, evidence of a victim's character can not act to lessen the State's burden of proof as to future dangerousness. Appellant's proposed questions asked simply whether the prospective jurors could follow the law. It injected no specific facts into the analysis, nor did the proposed question seek to commit the jurors to a specific outcome on the basis of certain facts. Instead, the defense sought only to ask whether the State would be held to its legal burden, as established by the Legislature in the punishment phase of a death penalty case. An affirmative answer by a juror, for example, that evidence of a victim's character *would*

cause the juror to answer yes to Special Issue No. 1, even in the absence of proof beyond a reasonable doubt, would have constituted proper grounds for a challenge for cause. TEX. CODE CRIM. PRO. art. 35.16(c)(2). Applying the test set out in *Standefer*, Appellant's proposed questions were not improper, since they sought only to determine whether prospective jurors could follow the law applicable in the case.³ Therefore, Appellant was denied the opportunity to ask a proper question, testing each prospective juror's ability to follow the law applicable to Special Issue No. 1. The proposed question seeking to determine whether proposed jurors could follow the law was no different than asking whether they could give probation in a murder case, reject an illegally obtained confession, or find that accomplice witness testimony was not properly corroborated.

Harm

As stated above, when counsel for an accused is precluded from asking a proper question, harm to the appellant is presumed because appellant has been denied the ability to intelligently exercise peremptory strikes. *Caldwell v. State*, supra. In a case where the State

³ Compare in *Standefer*, where this Court specifically mentioned capital cases and cited the example of victim/impact testimony. *Standefer* cited the following as improper:

Let us assume that you are considering in the penalty phase of any capital murder case, okay? And some of the evidence that has come in shows that the victim's family was greatly impacted and terribly grieved and greatly harmed by the facts....Can you assure us that the knowledge of those facts would not prevent you or substantially impair you in considering a life sentence in such a case?

Standefer v. State, 59 S.W.3d at 179-180 (citations omitted). In the instant case, Appellant sought only to determine whether each prospective juror would require the State to prove future dangerousness beyond a reasonable doubt, notwithstanding evidence of the victim's character.

seeks to impose the ultimate penalty, the harm can only be considered more pronounced. "Death is different," and the protections afforded an accused during voir dire can only be considered more crucial where the accused faces the possibility of a death sentence. In this case, the State did offer evidence of the victim's character. For example, the State introduced testimony that the complainant, Bertie Cunningham, was 80 years old at the time of the offense and lived alone. On the date of the offenses, she went to a mall far from home to pick up a robe for her disabled sister. (RXLVII,22-26). She had several family members and close friends who became concerned when she did not return home on time. Additionally, the State repeatedly emphasized in closing argument on punishment how the victim was eighty-years old and totally innocent, that she was out helping her disabled sister at the time she was abducted, and how she suffered horribly at the hands of Appellant. (R.LX,14-15). In closing argument on punishment, the prosecutor argued "...[b]ut, you know, Bertie Cunningham over here, this good and saintly woman over here, you know, there was a time not so long ago when was still ours, wasn't she? She was ours. She was our neighbor, our helper. She was our sister. She was our grandmother. She was our mother. Even more than that, she was an example to all of us, I submit to you, on how you live your life with dignity and grace." (R.LX,58-59). The State's character evidence and argument is directly applicable to the questions Appellant's counsel attempted to address in voir dire when counsel sought to ask whether jurors could follow the law and hold the State to proving future dangerousness beyond a reasonable doubt. The trial court improperly limited Appellant's voir dire. The trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO.2, RESTATED

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS PURSUANT TO ARTICLE I, SECTION 10 OF THE TEXAS CONSTITUTION BY LIMITING APPELLANT'S VOIR DIRE REGARDING THE STATE'S BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT POSED A FUTURE DANGER. (C.II,385)(R.V,8-10)(R.LX,14-15&58-59).

Article I, § 10, of the Texas Constitution guarantees the right to counsel. Such right includes the right of counsel to question members of the venire panel in order to intelligently exercise peremptory challenges. *Ex parte McKay*, 819 S.W.2d 478 (Tex. Crim. App.1990); *Shipley v. State*, 790 S.W.2d 604 (Tex. Crim. App.1990). As stated in the preceding Point of Error, Appellant sought to inquire of each potential juror as to whether the veniremember would follow the law applicable to Special Issue No. 1, by applying the applicable burden of proof despite evidence of the victim's character. (C.II,385)(R.V,8-10). The State's objection was sustained and the defense was prevented from asking the proposed questions. (R.V,10). Appellant asserts that the trial court thereby violated Appellant's rights pursuant to Article I, Section 10 of the Texas Constitution. The trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO.3, RESTATED

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF ARTICLE 35.16 OF THE CODE OF CRIMINAL PROCEDURE WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

Before a veniremember can be properly challenged by the State under TEX. CODE CRIM. PRO. article 35.16(b)(3)⁴ the law must be explained and the veniremember must be asked whether he or she can follow that law regardless of their personal views. *See Chambers v. State*, 903 S.W.2d 21, 29 (Tex. Crim. App.1995). To show error in the trial court's granting of the State's challenge for cause, an appellant "must demonstrate that the trial judge applied the wrong legal standard in sustaining the challenge, or the trial court abused its discretion in applying the correct legal standard." *Vuong v. State*, 830 S.W.2d 929, 943 (Tex. Crim. App.), *cert. denied*, 506 U.S. 997, 113 S. Ct. 595, 121 L. Ed. 2d 533 (1992). In this case, the State successfully challenged for cause veniremember Alena Treat on the basis that she required proof of a future murder before finding that Appellant posed a future danger. The record shows the following:

⁴ TEX. CODE CRIM. PRO., art 35.15(b) allows the State to challenge for cause on the basis

"3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction."

Voir dire of veniremember Treat:

[VENIREMEMBER]: Well, as far as the death penalty is concerned, I don't like there being a death penalty, but I also do not see that there's any logical alternative. So I would not have a problem adhering to the letter of the law. It seems like one of those necessary kind of things. I'm not an active proponent, but like I said, I don't see an alternative at this point.

[STATE]: Okay. Your reasons then for being – I know you're not an advocate of the death penalty, but let me ask you why do you feel like we need to keep the death penalty here in Texas? What purpose do you think it serves?

A. Oh, to protect society. Protect society from the same kinds of acts being committed again by the same individual.

Q. Okay. And I believe that you had said in your questionnaire danger to society will probably kill again. Is that kind of what you're telling us this morning, to prevent further murders by that same individual?

A. Yeah. And if those questions are answered in the way that you said, then that would be the case. It could be the case, very likely would be.

Q. Can you – can you think of any cases maybe that you've heard about recently, maybe read in the newspaper, heard about on television, where you thought maybe the death penalty might be an appropriate punishment in that case?

A. I don't read the paper a whole lot, but – the one that comes to mind would be like the Jeffrey Dahmer case.

Q. Right, and I believe you had listed him and he was in fact a serial killer.

A. Right.

Q. And I take it that in that case that you thought he had showed the propensity obviously to kill and kill again.

A. Yes

Q. Let's talk a little bit more about these special issues over her. And Judge Entz has already told you that – I believe, that the only time that you will see these special issues is if you find the defendant guilty of capital murder.

A. Right.

Q. Obviously if you find him not guilty, he walks out, everyone goes home. If you find him guilty of a lesser included offense, such as murder or robbery or something of that order, then a different verdict form would be used. But in this case before you get down to Special Issues 1 and 2, you in this case will have already decided that this individual right over here, Jedidiah Murphy, intentionally killed a woman by the name of Bertie Cunningham, that he did so intentionally, that he did so during the course of either robbing her or kidnaping her, and that he did so by either shooting her with a handgun or by drowning her in water and he did so intentionally again. You see, capital murder is always an intentional murder plus something else. It's not – it's not negligent homicide. It's not reckless conduct. It has to be a situation where it's my specific intent to cause someone's death. And then I do everything necessary to take their life. Okay. So that's what you will have already decided in this case before you get down to Special Issue Number 1.

Now, having found that, do you have any feeling about how you would be looking at Special Issue Number 1? And the reason I say that is in the past I've had some people tell me if I find someone has intentionally killed someone in that way, when I get down to Special Issue Number 1, in my mind that's probably going to be the type of person that would be a future danger to society. If I felt like they've already done that in the past.

Do you have any feelings about that?

A. The way I look at it it's a simple – if the person has already been – if the jury has already decided that the person is – had been proven to be guilty of capital murder, and it's proven that there is a high probability that this person would do it again, I would not have a problem with coming up with a verdict.

Q. Okay.

A. And going on to Number 2.

Q. Right. When you look at the word "criminal acts of violence," what does that mean to you, Ms. Treat?

A. Criminal acts of violence doesn't mean to me like going out and beating up somebody. To me, it would be the same – probably the same kind of crime.

Q. Okay.

A. Extreme danger to society.

Q. Right. Another murder, is that what you're talking about?

A. Yeah.

Q. Okay. You know, let me just tell you there are no legal definitions to any of these words. That's the other tricky part here. What we do is leave that up to you to define these word any way you want to.

A. Yeah, and –

Q. You're certainly free to do that. A lot of the words in the first part of the trial in the guilt/innocence about what intentional means, what knowing means, what exactly is a robbery or kidnaping, Judge Entz will give you definitions that you will have to follow. But when we get down to these – these words, the legislature gave us the words, but they said we want the jurors to define them the way they want to.

Do I understand you – well, let me just ask you, when answering Special Issue Number 1 then, is the State – is the State going to have show to you that there's a probability this man would commit a future murder in order for you to answer Special Issue Number 1 yes? Is that what you're saying to me or not?

A. I'm saying the State would – in my mind would have to

prove that the person would be likely to at least continue to attempt the same kind of thing, whether he – well, I guess in this case he would succeed or not is not the issue.

Q. Uh-huh. All right. So either attempt to commit a murder or actually commit a murder; is that what you're saying?

A. Well, yeah, but it says a threat to society. To me, threat means something that's very, very dangerous. It's not just something mild. This is – and to society it's – I know that's pretty broad – and there said a probability. To me that means a high probability. And that the defendant would – and it says criminal acts of violence. That's not just violence. That's something that would be under the Penal Code that would say they would be convicted of something really awful.

Q. So you're talking about something similar to what you've already convicted him of, correct?

A. Correct.

Q. Okay. And I think that you've said when you look at that, you're not talking about going out and punching somebody out or something of that order, correct?

A. Right.

Q. You're talking about something on the magnitude of what you've already found him – already have found in the first part of the trial; is that right?

A. Right.

* * * *

Q. Okay. All right. Fair enough. Let's go to Special Issue Number 2, if we could. And again, when you get down to Special Issue Number 2, you're really two-thirds of the way to a death sentence essentially. You've already found him guilty of murder – of capital murder. You've already decided that he's going to constitute a continuing threat to society. If you answer

Special Issue Number 2 no, he gets death. If you answer it yes, he gets life.

In the past some people have told us, you know, some people say I can follow the law regardless of what I've decided about him being a threat to society. I can still look at Special Issue Number 2 with an open mind, call it the way I see it. I've had other people tell me if I truly honestly think that that man is going to continue to threaten society with serious criminal acts of violence, there is really no way I'm going to find that answer to be yes and give him life and put other people at risk by doing so. I just couldn't do that.

What are your feelings about Special Issue Number 2?

A. Well, Special Issue Number 2 I do realize that there could be some kind of mitigating circumstances. There could be some reason. I don't know what that would be, but I think that a juror would have to keep an open mind on that and realize too that – I guess logically speaking that if person is likely to do – could commit another murder, that there wouldn't be – I don't think you could answer the Special Issue Number 2 to be – there is – there's a reason to give a life sentence.

What I'm trying to say is that I know that there is a different way of thinking on Number 1 and Number 2, but if a person's character or the circumstances seemed to indicate that the same kind of scenario would not occur again, then I would have to answer that in such a way that it would be a life sentence.

Q. Uh-huh.

A. But like I said, if I really believed that person would commit a really awful crime again, extremely violent, that their character seemed to indicate that, that there was no special reason that it occurred, special crime of passion or something like that, and then that would have to be fine, too.

Q. Well, let me just see if I understand. And again, some people have told me, and you tell me if you fit into this category or not, some people have told me if they honestly believe that somebody is likely to commit another murder in the future, that when they get down to Special Issue Number 2, there's not

going to be anything sufficient in the evidence at that point to change the death sentence to a life sentence if they really believe that person is likely to do that in the future.

Are you saying that, or are you saying something different?

A. Not exactly. It's pretty close to that, but I'm saying that it would be the responsibility of a jurist to listen to the evidence.

Q. All right.

A. And then answer the question.

Q. Okay.

A. I don't think a person can make a decision beforehand.

Q. Okay. Let me – let me touch on something –

A. At least I couldn't.

(R.XII,12-21)

* * * * *

THE COURT: Ms. Treat, I have a question in my mind for you, if I may, with regard to Special Issue Number 1.

VENIREPERSON: Okay.

THE COURT: Before answering Special Issue Number 1, would you require the State to prove to you that the defendant would commit or there's a probability that would commit another murder or attempted murder, or would a criminal act of assaultive behavior fit within your category of a criminal act of violence?

VENIREPERSON: Assaultive behavior just meaning beating somebody up or something? Well –

THE COURT: A pool hall fight. That's a for instance just where they – would that be a criminal act of violence.

VENIREPERSON: No.

THE COURT: – sufficient –

VENIREPERSON: I don't think so.

THE COURT: Where would you draw the line?

VENIREPERSON: (no response)

THE COURT: I assume you would not consider a property crime

VENIREPERSON: No. No, I wouldn't –

THE COURT: Stealing a car for instance?

VENIREPERSON: No.

THE COURT: Or drug possession or drug dealer would not be a criminal act of violence, or would it in your opinion?

VENIREPERSON: No, but I can see how maybe – oh, this is big hypothetical. Maybe intentionally causing a person to be mentally disabled for the rest of their life, maybe drugs – by intentionally giving them some kind of drug to put them into a coma something.

THE COURT: That would be a criminal act of violence in your mind?

VENIREPERSON: Yes. Yeah, that would be – because that person is – is actually having some kind of violence being committed to them. It's not just mild. It's something –

THE COURT: With regard to person-to-person type assaultive behavior, where would you draw your mental line that regard?

VENIREPERSON: Person-to-person assaultive behavior? Whether it fit Number 1?

THE COURT: Yes.

VENIREPERSON: Trying to kill them. Yeah, that would be –

THE COURT: Anything less of person-to-person physical contact be sufficient in your mind or not?

VENIREPERSON: Person-to-person physical contact? Could you give me an example of something that would be extremely violent? You know – I'm having difficulty.

THE COURT: Having road rage, for instance, running somebody off the road.

VENIREPERSON: Running – of –

THE COURT: You know, don't mean to kill them necessarily, but you've got road rage and had a bad day at the office or a bad day at school or coming home, things have gone wrong, person cuts you off right in front of you and that's it. Run them off the road. Don't mean to kill them.

VENIREPERSON: I don't think necessarily just road rage would do it, but if a person had a tendency to go off all the time in such a way that it was quite likely that the person could cause death because they are incorrigible, they cannot be rehabilitate – they can't – it's not just rehabilitated. They would have the tendency to continue to do things that could result in people's death. I guess we're back to the same – I guess we're back to the same thing. I know that a threat to society could be a person that would just blow up at the drop of a hat and beat them senseless, somebody that would do that on a constant basis or have a hair trigger like that would be a threat to society, so I guess that is not necessarily something that would result in death, but a person who continues to do that kind of thing it's quite likely that eventually that they would kill somebody.

THE COURT: In light of the Court's questions, I will permit each side, if they wish, an additional five minutes of questions.

Would the State care to exercise any additional time or not?

Redirect Examination

By Mr. Davis:

Q. Let me ask you, Ms. Treat, because I've been listening to your answers. When I talked with you about Special Issue Number 1. And really the Court is looking at criminal acts of violence there. And when I looked at your questionnaire, you said only in favor of the death penalty if a person committing murder is a danger to society. You put in parenthesis will probably kill again.

A. That was an example.

Q. Yeah. And when I was talking with you earlier, I understood you to say that simply assaulting someone causing injury, serious bodily injury was not going to cut it for that, but really you're talking about murder and attempting to murder someone. Have you changed your mind about that?

A. Not exactly, but I can see that intentionally disabling somebody for the rest of their lives, like mentally making them incompetent, that would be a criminal act of violence. But that's still to me pretty close to killing somebody, if you're killing their mind.

Q. Right.

A. But that's – to me – but my first thought is still criminal act of violence to mean – means something so extremely violent that a person's life is in danger.

Q. I think that you told me earlier that really what you're looking at is if something similar to what you've found they've done before. Is that pretty much what you're talking about?

A. It could be.

MR. DAVIS: That's all I have, Judge.

THE COURT: Mr. Byck.

Recross-Examination

By Mr. Byck:

Q. Ms. Treat, the law does not define criminal acts of violence. Criminal acts are acts the Penal Code. They range from – I don't know if the traffic code, that's not really in the Penal Code, but innocuous acts like trespassing on somebody's property when you've been told not to is a criminal act.

A. Right.

Q. Obviously there's no violence there.

A. Right.

Q. Goes all the way up to murder, where there is obviously violence. There are some criminal acts in the middle. Give you an example, arson. It's entirely possible that I could go burn down empty houses in the middle of nowhere where you might or might not consider that a criminal act of violence. Rape is a criminal act. I may not have any intent to kill my victim. I may under the delusion that my victim loves me and really is inviting this behavior. Armed robbery. I may be the nicest, most politest armed robber you ever saw, oh, please give me your money, but I am still pointing a knife at you. I don't want to hurt you. Is that a criminal act of violence? Is the rape a criminal act of violence?

A. There is a possibility that rape could be a criminal act of violence, but again, it would have to be proven that there's a probability that the defendant would commit further acts of violence.

Q. Right. Right.

A. And I guess – I guess –yeah, that's what I was looking for was some kind of definition of –

Q. There really isn't a definition.

A. – an act of violence. And it's also weighted. It should be

weighted as to how much is it really a threat to society. Is it a – and the key word is continuing threat.

Q. Yes, that would all be subject to proof by the evidence.

A. Right.

Q. But essentially what we're all saying, all of us, the Court, the District Attorney, and myself, is if you were shown of evidence of a propensity to commit criminal acts of violence that were less than murder or attempted murder, let's say they involved robbery or burglary, you mentioned – or the Judge mentioned a barroom brawl. Well, Ms. Treat, let me submit to you there's all kinds of barroom brawls. There's a barroom brawl between two people of equal size and strength and age. There's a barroom brawl between, you know, young husky kids and little old men. There's a barroom brawl when one person has a weapon and the other doesn't. There are all kinds of barroom brawls. What we want to know is do you consider or if the evidence were to be presented, would consider acts other than murder or attempted murder as criminal acts of violence. I've given you rape, given you armed robbery, given you aggravated assault with a deadly weapon. I haven't thrown in beating up pregnant women, but I might as well. Can you see where all of those would be criminal acts of violence?

A. All of those – I guess it depends on where on the scale that particular crime would fall. Some of those you described are acts of violence, but they aren't necessarily a continuing threat to society.

Q. Well, that would have to – that's another issue. That would have to be proved to you by the evidence.

A. Yeah. Some of those that you described are evidence of a continuing threat to society. If a person –

Q. But remember, we're just talking about criminal acts of violence.

A. Yeah. Right.

Q. Continuing threat to society is something added on.

A. Yeah.

Q. Let's start out with basic platform. Very frankly, what's a criminal act of violence? Is it something more than murder or attempted murder, like armed robbery, rape, aggravated assault with a deadly weapon?

A. Yeah, I think it really could be. But again, that statute states that it has to be a criminal act of violence and it also has to constitute a continuing threat.

Q. Oh, absolutely.

A. So it –

Q. Absolutely. That's exactly right.

A. So it would have to fit all the criteria.

MR. BYCK: I have nothing further, Your Honor.

(R.XII,42-50)

Application of Law to Facts

TEX. CODE CRIM. PRO. Article 37.071(b)(2) requires jurors in a capital murder case to determine whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Although the phrase “criminal acts of violence that would constitute a continuing threat to society” is not defined, there is no limitation that Article 37.071(b)(2) requires evidence of future murders. *See Drew v. State*, 743 S.W.2d 207, 211 (Tex. Crim. App. 1987). In *Drew*, this Court held that “[w]e do not interpret the phrase ‘criminal acts of violence that would constitute a continuing

threat to society' as by any means being limited to future murders. *Id.* However, unlike the instant case, the challenged veniremember in *Drew* was specific as to his personal requirement that the State prove a future murder in order to prove future dangerousness. The challenged veniremember in *Drew* stated as follows:

TRIAL JUDGE: In other words, the only way they could possibly do that as far as your mind is concerned is to show you that he is liable to commit another murder, not some rape or robbery or assault but another murder, another taking of a person's life intentionally. That's what they would have to show you before you would vote yes to that. Is that what you are saying?

A. *Yeah. That's what I am saying.*

Q. So, you are telling the State that there is no way that you can prove beyond a reasonable doubt to me that there is a probability he will commit future acts of violence that will be a continuing threat to society unless you show me he is going to do a murder; is what (sic) what you are telling us?

A. It is something like that. Yes.

Q. Is that what you are saying?

A. *That's what I am saying.*

Q. All right. And then there is no way that you could answer that question any other way?

A. Not at this time. (Emphasis supplied.)

Id. at 210.

The voir dire of veniremember Treat hardly reveals the type of "absolute prerequisites" of future murder mentioned in *Drew*. Veniremember Treat even offered an

example of future danger which was not a murder, such as drugging another person.

In apparent conflict with *Drew*, the Court of Criminal Appeals in *Garrett v. State*, 851 S.W.2d 853, 860 (Tex. Crim. App. 1993) held that it is error to grant the State's challenge for cause against a veniremember who would never answer "yes" as to future dangerousness where there was no evidence to prove future dangerousness apart from the capital murder offense for which the appellant was tried. A veniremember is not biased against the law if they believe that the offense on trial, by itself, can never establish that the accused is a continuing threat because "a particular juror's understanding of proof beyond a reasonable doubt may lead him to require more than the legal threshold of sufficient evidence to answer the [first] special issue in the affirmative." *Id.* at 859-60. Notwithstanding the inherent conflict between *Garrett* and *Drew*, the trial court erred in granting the State challenge for cause against veniremember Treat because the record in this case fails to show that Treat absolutely required proof of a future murder. Treat is less like the veniremember in *Drew*, and more like the one in *Garrett* who was not considered biased against the law since they believed that the offense on trial, by itself, can never establish future dangerousness. Therefore, the trial court abused its discretion in granting the State's challenge for cause. The case should be reversed and remanded for a new trial.

POINT OF ERROR NO.4, RESTATED

THE TRIAL COURT ERRED BY GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO VENIREMEMBER ALENA TREAT, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE RECORD REFLECTS THAT THE VENIREMEMBER WAS NOT CHALLENGEABLE FOR CAUSE. (R.XII,12-21&42-50).

Due process of law, applicable to the states through the 14th Amendment, forbids the disqualification of a veniremember in a capital trial because the veniremember is opposed to the death penalty. *Witherspoon v. Illinois*, 391 U.S. 519 (1969). *Witherspoon* only allows the disqualification of such a juror when her views about the death penalty prevent or substantially impair her ability to follow the courts instructions and the juror's oath. *Witherspoon* establishes a constitutional limitation on a state's power to exclude a veniremember when a trial court finds the potential juror was disqualified under state law. The legal standards for imposing a death sentence must be explained to the veniremember, who must then be asked whether she can follow that part of the law before the veniremember can be removed for cause without a *Witherspoon* violation. See *Clark v. State*, 929 S.W.2d 5, 8-9 (Tex. Crim. App. 1996).

As set out in the previous Point of Error, the voir dire examination of veniremember Alena Treat does not demonstrate that Treat's views on the law applicable to the case prevented or substantially impaired her ability to follow the courts instructions and the juror's oath. (R.XII,12-21&42-50). To the contrary, she stated that she could find that

Appellant constituted a future threat, even in the absence of proof of a future murder. By granting the State's challenge for cause, the trial court violated Appellant's Due Process rights pursuant to the 14th Amendment to the United States Constitution. U.S. CONST. amend. XIV. The trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO. 5, RESTATED

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER PHILLIP MAY. (R.XVII, 99-101).

POINT OF ERROR NO. 6, RESTATED

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER JOHN ROBUCK. (XVIII, 47-53).

POINT OF ERROR NO. 7, RESTATED

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER THOMAS BROOKS. (R.XXVIII,49-52).

POINT OF ERROR NO. 8, RESTATED

THE TRIAL COURT ERRED IN VOIR DIRE BY DENYING APPELLANT'S REQUESTED CHALLENGE FOR CAUSE ON VENIREMEMBER KIMBERLY WILLIAMS. (RXXXVII,146-148&180-184).

The selection of a jury for the trial of a criminal case invokes constitutional protections. The Sixth Amendment to the United States Constitution states in part that: "[i]n all criminal prosecutions the accused shall have a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The right embodied in this clause of the Sixth

Amendment is one that, under the Due Process Clause of the Fourteenth Amendment, states may not deny. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Like its federal counterpart, the Bill of Rights in the Texas Constitution recognizes the right to trial by jury. "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." TEX. CONST. art. I, § 10.

TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon Supp. 1999) provides in part the following:

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

9. That he has a bias or prejudice in favor of or against the defendant.

(c) A challenge for cause may be made by the defense for any of the following reasons:

2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

The proper standard to be used in disqualifying prospective jurors in death penalty cases is whether their views would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and the oaths given. *Davis v. State*, 782 S.W.2d 211, 216 (Tex. Crim. App. 1989); *Bell v. State*, 724 S.W.2d 780, 794 (Tex. Crim. App. 1986), *cert. denied*, 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987). Great deference is given to the trial court which is in the best position to gauge the demeanor and

Appellant's voir dire of veniremember Phillip May

In the event of a conflict, veniremember May would follow God's law over law in the court's charge.

[DEFENSE]: Okay. Let me ask you a question, and I always ask this question. I ran for Judge about three years ago and someone asked me this question. It's always a question I kind of almost daily deal with. In the situation we have right here is where we are in a courthouse and so thus we're dealing with laws.

A. Right.

Q. And we can term those laws of man.

A. Uh-huh.

Q. And there are sometimes that the laws of man conflict with the laws of God. And someone asked me one time if I felt like the laws of man conflicted with the laws of God, specifically the Ten Commandments, which ones would I adhere to. And so I'm going to kind of throw that question into your lap and see how you would answer that question.

A. Well, I think with regard to this case there's two – there's the Commandment obviously that says thou shalt not kill. I assume that's essentially what you're referring to. And I think that is a rule for an individual person, but in Romans 13, I believe it is, it also talks about that you are to abide by the government and to honor them and that they do not bear a sword without purpose of maintaining peace. And if you step outside of those bounds, then you should be – you should recognize and realize that the government may step in with its sword to make sure that the peace is maintained. And so that's how I guess delineate between the two –

Q. Okay.

A. – as to – you know, the purpose of this court is that part of the government that bears the sword to say, hey, we will

maintain peace.

Q. Okay. That's kind of where I thought that you were basically trying to get to at the very beginning of your questioning with Ms. Miller. So I guess basically what I'm asking you is, if you felt like you were instructed as to the law in regard to this case and the result of which would conflict with your own personal religious beliefs, would you follow the law that you're sworn to uphold as a juror or would you side with your religious beliefs in that situation?

A. Okay. I don't – in this instance I don't see how it would conflict with my religious beliefs. But I mean, if it did, then I would stand with my religious beliefs. Does that make sense?

Q. Yes, that does make sense.

A. Okay.

Q. So as you take the oath of – when you're sworn in as a juror, you are sworn to a true verdict render based on the law and the evidence in this case. And if you felt like your true verdict was in conflict with your religious beliefs, that you would go with your religious beliefs?

A. If I felt like that would occur, yes.

(R.XVII, 99-101).

It is the burden of the challenging party to establish that a challenged veniremember is substantially impaired in their ability to follow the law. *Clark v. State*, 929 S.W.2d 5, 8 (Tex. Crim. App. 1996), citing *Hernandez v. State*, 757 S.W.2d 744, 753 (Tex. Crim. App. 1988). This veniremember was not sure whether the law applicable in the case would in fact conflict with his own religious beliefs. However, if so, the veniremember's religious beliefs would control, at the expense of the law given by the trial court judge. The veniremember's

answer clearly showed he would not follow the law applicable to the case if that law conflicted with his own personally held religious beliefs. Therefore, the trial court abused its discretion in overruling Appellant's requested challenge for cause. The trial court judgement should be reversed and the case remanded for a new trial.

Defense voir dire of veniremember John Robuck

Unable to consider five years for murder

[DEFENSE]: Well, getting back to the original offense. Capital murder is a specific intent offense. And specific intent will be defined for you as – and I like to use myself in the example because I can't remember other people's names. It's too much of a hassle for me. That is when I act where it is my conscience objective or desire both to engage in the conduct and cause the result.

Let me give you an example of that. My co-counsel has allergies. Well, I'm an extremely intemperate person mainly because I'm afflicted with them myself. You know, I've got no problem with my allergies, and I'm tired of hearing about hers. So I brooded about it all weekend. And I've decided, okay, if she comes in snarfling and coughing again, I'm going to kill her. So I go out this weekend and I buy a gun. And then I go to another store and I buy a box of shells, put the – load the shells into the gun. Then I sneak it in downstairs. Believe me, it wasn't that hard to do. And I come up here and here she is, red, snarfling, and doing her allergy thing and I say that's it. I pull out the gun and I point it at her. I don't do that to frighten her. I cock the gun and aim it at her and pull the trigger. I do not do that to wound her. I do it all to kill her. That is an intentional capital murder. That's an intentional murder if I steal her yellow Marks-A-Lot after I do that, that makes it a capital murder. Okay.

If in the event an individual were charged with capital murder, but not convicted of the underlying offenses, that is, the kidnaping or the whatever, arson – it also goes to prison guards, police officers, fireman in the course of duty, children under 6,

serial murders and mass murders. Okay. If those underlying circumstances are not found, then I'm guilty of murder. I'm guilty of the murder of my co-counsel. In that situation, the range of punishment would be as the range of punishment for a regular murder, 5 years to 99 years or life.

Now, some people say, well, I could certainly give you life for that in a heartbeat, Mike, but I don't know about five years. Other people say, I don't know if I could give you anything less than 20 for doing something like that, man.

The question is: If in a case of an intentional murder, as I have described, if you were presented with facts and circumstances that as a bottom line you thought, yeah, gee, I think the person really ought to get five years for that, but I just can't give it to him, there's just, you know, something in my code that says I cannot sign off on five years.

Is that a possibility, or is your mind more of the set that, no, an intentional murder is certainly an obviously extremely serious offense. You know, just because you didn't prove you swiped the Marks-A-Lot doesn't mean that, you know, anything a whole lot short of capital. But in the appropriate facts and circumstance, if I believed it and I thought – if you committed a murder like that for whatever – whatever reasons you had were so good that I felt you ought to get five years in the penitentiary for you-- for it, I'd give you five years in the penitentiary for it.

Do you feel that way, or do you feel that, I'm sorry, I don't care what you show me, you're going to have to do more time than five years?

A. I think you have to spend more time than five years if it's intentional.

Q. If it's intentional?

A. If it's intentional.

Q. And again, what I'm saying is – you understand what intentional means?

A. Right.

Q. I've given you that example that – and this is the question :

I'm not asking you to envision a scenario –

A. Okay.

Q. –where, you know, five years would be appropriate because, you know, some people can, some people can't, but that's unfair to do anyway. What I'm – the question that I'm asking you is that after hearing all the facts and the evidence, you say to yourself, well those are really good defense facts and evidence, and I as an individual feel that this guy ought to get – Mike ought to get five years in the penitentiary, but I can't give him five years in the penitentiary for an intentional murder. It's just got to be more than that. Is that a fair summation of the way you feel?

A. Yes, sir.

Q. Is there anything I'm going to be able to say to talk you out of that? Or do you feel pretty strongly about that?

A. Tough question. I don't know. Five years is not really a long time for an intentional murder.

Q. All right. I agree. I absolutely agree, but that's the range of punishment.

A. Right.

Q. And that's what I'm eligible for.

THE COURT: May I offer you a couple of suggestions for you to consider?

VENIREPERSON: Sure

THE COURT: Husband and wife married to one another, a very committed relationship for many, many years. Successfully raise and educate three or four children, all of whom are married, have children of their own, all doing well. Matriarch of this family develops a terminal illness, life support system, begs loving, committed husband to pull the plug.

VENIREPERSON: Right.

THE COURT: That's what they say down in Austin. Prior to 1974, it was 2 to 99 years or life, as little as 2. All kinds of circumstances and relationships between parties that result in an intentional killing.

Mr. Byck, give you your time back.

[DEFENSE]: Thank you, Your Honor.

VENIREPERSON: I'll change my answer then.

[DEFENSE]: Okay. Would you change it just to the extent of the euthanasia example because obviously that's a very extreme example.

THE COURT: I admit. I admit that.

[DEFENSE] I'm not accusing the Judge of – obviously, I've been sitting here thinking of some pretty extreme examples, too.

A. I think it completely depends on the circumstance.

Q. Okay. But you could do it in situations other than euthanasia?

A. Nothing comes to mind right now, but I'm sure if it was the right circumstance.

Q. Okay. All right. That's fair enough. It's a hard enough situation. Let me see –

THE COURT: Nothing come to my mind that the stock market couldn't go down much lower than it is right now, but in your business, I'm sure you can figure out scenarios, earnings, public confidence, problems with China, foot and mouth disease, and all sorts of factors out there, right?

VENIREPERSON: Yes, sir.

(XVIII, 47-53).

A. That's true.

Q. Right?

A. That's true.

Q. Okay. On a scale of one to a hundred in context of our capital murder trial, how would you define probability? It would have to be a chance of at least 10 out of a hundred, 20 out of a hundred, 50 out of a hundred, 51 out of a hundred, 75 out of a hundred? How would you define probability?

A. I think that would totally depend on the individual.

Q. I don't understand that answer.

A. We're talking about one individual. The probability of say you, for instance, committing another crime.

Q. Uh-huh.

A. I think a lot of it would have to do with you as an individual.

Q. Well, yes, you're exactly right, because that's what we're asking is whether this individual or that individual is probably going to do something. But the – my question is what is your definition of probable.

A. Between one and a hundred.

Q. Is it at least 51 percent?

A. No.

Q. It's not?

A. I think – I still go back to the fact that I think it's the individual case, the individual.

Q. Well, let's see if I can explore this a little bit with you –

A. Maybe you're not directing the question to where I totally understand it.

Q. That's my problem, and let me see if I can remedy that.

THE COURT: What is a word that you would use as an equivalent to probability? A synonym?

VENIREPERSON: Well, a probability would be something that's possible in the future, but – if I'm looking at a scale from 1 to 10, I couldn't say you as an individual speaking to me, what is the probability factor from 1 to 10, you know. I don't know what you might do. I don't think I can put a number on it.

[DEFENSE]: Could you– if you can't put a number on it, could you say that probability is a chance or probability is more likely than not or probability is pretty certain?

A. I think it's only a chance.

Q. It's only a chance?

A. Yes.

Q. And that would be your definitions?

A. Yes.

Q. And that would be the definition that you would use?

A. Yes.

(R.XXVIII,49-52).

Analysis

In Special Issue No. 1, the term "probability" is not statutorily defined, and the trial court does not err in refusing to instruct the jury as to a definition. *See Earhart v. State*, 823 S.W.2d 607, 632 (Tex. Crim. App.1991); *Caldwell v. State*, 818 S.W.2d 790, 797 (Tex.

Crim. App.1991). Therefore, the term is to be taken and understood in its usual acceptance in common language. See TEX. CODE CRIM. PRO. article 3.01 (“All words, phrases and terms used in this Code are to be taken and understood in their usual acceptance in common language, except where specially defined.”).

In *Cuevas v. State*, 742 S.W.2d 331 (Tex. Crim. App.1987), this Court recognized various dictionary definitions of the term “probability” when addressing the same issue presented here. “Dictionary definitions of ‘probability’ include: ‘likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; consonance to reason.... A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.’ *Black's Law Dictionary* 1081 (5th ed. 1979); “Something that is probable, with ‘probable’ meaning ‘supported by evidence strong enough to establish presumption but not proof; likely to be or become true or real.’” *Webster's New Collegiate Dictionary* (1980); *Cuevas*, 742 S.W.2d at 347.

In *Hughes v. State*, 878 S.W.2d 142, 148 (Tex. Crim. App. 1992), *cert. denied*, 511 U.S. 1152, 114 S.Ct. 2184 (1994), a veniremember indicated that he understood “probability” as any percent possibility rather than as a “likelihood” or “good chance”. This Court pointed out that in its usual acceptance, “probability” is something more than a “possibility,” therefore the veniremember was properly challengeable for cause and the trial court abused its discretion in denying appellant's challenge. *Id.* The case was reversed and remanded. *Id.* Similarly, in the instant case, veniremember Brooks considered probability of future violence to be satisfied upon proof of a possibility. The trial court abused its

discretion by denying Appellant's challenge for cause. The trial court judgement should be reversed and the case remanded for a new trial.

Voir dire of veniremember Kimberly Williams

"probability" = possibility

[STATE]: Let's look at some of the words up here, and the reason we do that is these words don't have legal definitions. The legislature was kind enough to give us the words, but they didn't tell us what they meant. So what we'll do is we'll look to you to define these words. Okay? The first word I want to look at with you is the word "probability." Whether there is a probability that the defendant would commit criminal acts of violence. When you look at the word "probability" in Question Number 1, what other words come to mind? How would you define probability? What does that words mean to you?

A.. It means that it's possible it could, or could have not.

Q. Okay. Now, the legislature -- you know, when they gave us the word, they could have chosen other words. They could have lowered the bar for the State so low as to say that all we have to prove is there's a chance that he would commit criminal acts of violence or that there's a possibility that he would commit criminal acts of violence. They've given us the word probability. Let me ask you, on a scale of zero to one hundred, zero being the very slightest chance ever, one hundred being an absolute certainty. Where on that scale between zero and one hundred would you put probability if you had to assign to that?

A. I would say 50.

Q. 50? Okay. All right. Probability is like a majority and a minority. To be a majority, would you agree with me it has to be more than 50 percent to be a tea? [SIC]

A. Yes.

Q. Anything less would be minority. Same kind of thing on probability. At least, to be a probability, can you see where it has to be at least greater than 50 percent? Now, it may be higher than that. If you want it to be higher, but can you agree with me it has to be at least greater than 50 percent? Anything less than that would simply be a possibility or a chance, which the law says I've got to prove more than that on Special Issue Number 1.

A. Yes.

(RXXXVII,146-148).

* * * * *

[DEFENSE]: Okay. When we're talking about the word "probability," you said that – initially you said that the words that you would use to describe that were possibility or could – possible or could happen again.

Are those still the terms that you would use in – in defining probability?

A.. Yes.

Q. Okay. Would you define it as mere possibility? Well, possibility?

A. Possibility.

Q. Okay. Or what about a mere chance? Would you define it as that?

A. No.

Q. Okay. But a possibility?

A. Possibility.

Q. Okay. And that's even if you thought – you talked with Mr. Davis that, you know, that might be over 50 percent, but in those things does that mean possibility to you?

A. You're confusing me. Say that again.

Q. Okay. I'm confusing myself. For you, probability means possibility?

A. Correct.

Q. Okay. So the State would have to prove in answering – prove to you in Special Issue Number 1 that there is a possibility that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A. Yes.

Q. And when we're talking about possibility is – when you're talking about possibility, is that – if we said, you know, 10 chances, are we saying 5 out of 10 chances, are we saying 1 out of 10 chances, or just a possibility that it could happen again?

A. It's a possibility that it could happen.

Q. So would it be less than 5 chances out of 10?

A. I don't understand what you're asking me.

Q. Okay.

THE COURT: Would it be less than 50 percent, or 50 percent, or more than 50 percent, your possibility in the context of Special Issue Number 1?

A. I can't say.

THE COURT: All right.

[DEFENSE]: Okay. So basically just a possibility?

A. Yes.

Q. Okay. Let's say if the weatherman said there was a 10 percent chance of rain, would that you say that's a probability

of rain?

A. I'd say it's possible.

Q. Okay. Possible in the context of Special Issue Number 1?

A. I would say it's possible.

Q. Okay. So in your mind possible and probability – possibility, probability mean the same thing?

A. That it could or could not happen.

Q. Okay.

THE COURT: Ms. Balido.

MS. BALIDO: Yes. Thank you, Judge.

[DEFENSE]: For you to answer Special Issue Number 2 no, would we have to prove to you that he would not commit criminal acts of violence?

THE COURT: Special Issue 2?

[DEFENSE]: I'm sorry, Special Issue Number 1.

MS. BALIDO: I'm sorry, Judge.

A. Could you repeat that question again?

Q. (By Ms. Balido) For you to answer Special Issue Number 1 no, that there is not a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, would we have to prove to you that that answer should be answered no, that he would not be a continuing threat?

A. Could you rephrase that, because I'm not understanding what you're asking.

Q. Okay. This – I'm trying to figure out, and it may be just

may be not understanding what you're saying. What probability means in your mind. Okay? I'm trying to figure out if probability means more likely than not or probability means possibility, or if all those things mean the same thing to you.

A. Probability means to me it's possible that it could happen or it couldn't happen. And until, you know, the evidence, you can't really say.

Q. Okay. If we're talking about a – an even chance that it could happen, it could or it could not happen, like – like flipping a coin that it could or could not happen, is that a probability or is that a possibility to you? This is why people hate lawyers.

A. It's a possibility.

Q. Okay. And that's the possibility that you would go by when you're talking about possibility in regard to probability in Special Issue Number 1?

(R.XXXVII,180-184).

Analysis

As with the previous veniremember, this individual was subject to a challenge for cause on the basis that they could not distinguish any difference between the mere *possibility* of future violence as opposed to the *probability* of violence occurring. The trial court abused its discretion in denying Appellant's requested challenge for cause. See *Hughes v. State*, *supra*, at 148. Therefore, the trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO. 9, RESTATED

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN VOIR DIRE WHERE TRIAL COUNSEL USED PEREMPTORY STRIKES AGAINST TWO VENIREMEMBERS WHOM COUNSEL ERRONEOUSLY BELIEVED HAD BEEN UNSUCCESSFULLY CHALLENGED FOR CAUSE. (R.XXXVII,135) (R.XLV,45-48&51) (R.XLIV,13-14).

Appellant's trial counsel used all peremptory challenges, and then requested two additional strikes, which the trial court refused. Counsel asserted that two objectionable jurors sat on the jury, and that two peremptory strikes were used against veniremember 44, Mark Colditz, and veniremember 36, John Wilson. (R.XLIV,13-14). Counsel stated that the defense challenged veniremember Colditz for cause and therefore used a peremptory strike after the trial court refused the requested challenge. (R.XLIV,13-14). Trial counsel stated that peremptory challenges were used only against "the worst of the worst," and that Colditz fit that category due to unfavorable answers related to the definition of "probability" and future dangerousness. (R.XLIV,13-14). However, the record shows that Appellant's counsel never submitted Colditz for cause at all. (R.XLV,51). In fact, veniremember Colditz stated that "probability" of future violence required proof of a *70 or 80 percent* chance. (R.XLV,45-48). As for veniremember John Wilson, trial counsel believed the defense unsuccessfully challenged Wilson for cause, and counsel therefore used a peremptory challenge. (R.XLIV,13-14). Yet, the record shows that John Wilson was accepted by both

sides and was in fact never challenged for cause. (R.XXXVII,135). Trial counsel apparently used two precious peremptory challenge against veniremembers whom counsel mistakenly believed were adverse to the defense and whom the defense had unsuccessfully challenged for cause.

Applicable law

Voir dire is a critical stage of criminal proceedings for constitutional purposes. *See Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246, 104 L.Ed.2d 923 (1989). Both the Sixth Amendment of the United States Constitution and article 1, section 10 of the Texas Constitution guarantee the assistance of counsel during this critical stage of criminal proceedings. In reviewing the effectiveness of counsel during voir dire, the standard declared in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and adopted by Texas in *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App.1986) should be applied. *See Knight v. State*, 839 S.W.2d 505, 506 (Tex. App.--Beaumont 1992, no pet.). To prevail on a claim of ineffectiveness, an appellant must prove by a preponderance of the evidence (1) that his or her counsel's representation fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced his or her defense. *Strickland*, 466 U.S. at 688; *Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App.1999). To meet this burden, the appellant must prove that his or her attorney's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for the attorney's deficiency, the result of the trial would have been different. *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App.2000). Under this

standard, a claimant must prove that counsel's representation so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App.1999). As far as strategic or tactical reasons for counsel's action or inaction, in the absence of direct evidence of counsel's reasons for the challenged conduct, a reviewing court will assume a strategic motivation if any can be imagined. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App.2001). The challenged conduct will not constitute deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *Id.*; see *Thompson*, 9 S.W.3d at 814. The burden is on the appellant to identify the acts or omissions of counsel that are alleged to have constituted the ineffective assistance and then affirmatively prove that they fall below the professional norm for reasonableness. *Jackson v. State*, 973 S.W.2d 954 (Tex. Crim. App.1998). Then, the appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *Strickland*, 466 U.S. at 693.

Application of law to facts

The record affirmatively shows that Appellant's trial counsel used peremptory challenges against the wrong veniremembers. On review, this Court is not required to attempt to imagine what strategic motivation, if any, lies behind trial counsel's actions. *Garcia v. State*, 57 S.W.3d at 440. Instead, trial counsel dictated into the record that a peremptory

challenge was used on veniremember Colditz because Colditz gave unfavorable answers regarding the definition of "probability," and the trial court refused to grant Appellant's challenge for cause. The record, however, is completely to the contrary. Appellant's counsel never submitted Colditz for cause, and Colditz defined "probability" of future dangerousness as requiring proof of a 70 to 80 percent chance. Meanwhile, counsel apparently believed that veniremember Wilson was submitted for cause, and therefore a peremptory challenge was used against Wilson. However, the record shows that Wilson was accepted as a prospective juror by both sides. The above errors cannot be characterized as "trial strategy" and the errors were significant because counsel effectively forced Appellant into accepting two "objectionable" jurors (# 17 - Richard Bachmeyer & # 19 - Robert Mendro). (R.XLIV, 13). Had counsel not mistakenly used two precious peremptory challenges against Colditz and Wilson, counsel would not have been forced into accepting these two objectionable jurors. Counsel's errors fell below an objective standard of reasonableness. The trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO. 10, RESTATED

THIS APPEAL SHOULD BE ABATED UNTIL THE TRIAL COURT FILES FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY TEX. CODE CRIM. PRO. ARTICLE 38.22, §6.

Prior to trial in this case, Appellant filed pretrial motions seeking to suppress oral statements made by Appellant after his arrest, as well as the written statement signed by Appellant while in police custody. (C.I,11). On June 5, 2001, the trial court held a hearing outside the jury's presence in which evidence was presented regarding oral incriminating statements made by Appellant after his arrest, and regarding the written voluntary statement signed by Appellant while in police custody. Appellant testified and disputed the evidence offered by the State. In Appellant's oral statements, he told officers where the complainant's body was located. In his written statement, he admitted shooting the complainant, but explained that the shooting was accidental. The trial court denied Appellant's motion to suppress the oral and written statements and the State offered the statements into evidence. However, the Clerk's Record contains no written findings of fact and conclusions of law entered by the trial court with regard to the admissibility of 1) the oral statements made by Appellant after he was arrested and placed in handcuffs, and 2) the written statement signed by Appellant and offered into evidence as State's Exhibit No. 47. Apparently, the trial court judge never made written findings of fact and conclusions of law resolving the disputed evidence related to Appellant's oral and written statements.

Appellant's counsel on appeal filed a Motion to Abate this appeal, seeking remand

to the trial court for findings of fact and conclusions of law. At the same time, counsel filed a motion to extend the deadline for filing Appellant's Brief.

In an Order dated June 6, 2002, this Court granted Appellant's Motion to Abate "to the extent that the trial court is directed to prepare findings of fact and conclusions of law as required by Article 38.22, Section 6." A supplemental record containing the trial court findings was ordered to be filed by July 6, 2002. This Court, however, denied Appellant's motion to extend the filing of Appellant's Brief, which sought an extension until after the record was supplemented, and counsel had an adequate opportunity to review the findings.

Counsel asserts that Points of Error should be raised in Appellant's Brief with regard to the trial court's denial of Appellant's motions seeking to suppression of Appellant's oral and written statements at trial. Yet, counsel cannot effectively brief these issues without the trial court findings. Appellant therefore requests that the entire appeal be abated and the time for filing Appellant's Brief be extended.

POINT OF ERROR NO. 11, RESTATED

APPELLANT RIGHTS PURSUANT TO THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE INFRINGED WHERE THE TRIAL PROSECUTORS EXAMINED LETTERS AND NOTES WRITTEN BY APPELLANT TO HIS TRIAL ATTORNEYS, WHICH THE TRIAL COURT JUDGE DETERMINED WERE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Prior to trial, Appellant's written notes and letters were seized by staff in the Dallas County Jail after Appellant made a suicide attempt. The assigned prosecutors learned that Appellant's personal writings had been seized and contacted the Dallas County Sheriff's Department for the purpose of examining the notes. The trial prosecutors went to the sheriff's office where they inspected Appellant's writings. The prosecutors elected not to first tender the writings to the trial judge for an *in camera* inspection, nor did they first seek to obtain a search warrant based upon probable cause. The prosecutors also did not elect to inform Appellant's trial counsel of their intent to review Appellant's personal writings before doing so.

During trial, the trial court judge conducted a hearing in which he determined that some of the documents reviewed by the trial prosecutors were in fact protected by the attorney/client privilege. The two trial prosecutors testified and admitted reviewing the documents before trial but denied using any information contained in the documents in preparing the prosecution of the case. (See Appendix A). None of the seized items were

offered into evidence before the jury.

Applicable Law

The right to counsel is violated when law enforcement officers knowingly intercept confidential attorney-client communications and disclose these to the prosecution. *See U. S. v. Zarzour*, 432 F.2d 1,3 (5th Cir. 1970)(citations omitted); *U. S. v. Levy*, 577 F.2d 200 (3rd Cir. 1978). The holdings in *Zarzour* and *Levy* turn on whether or not the intrusion was unlawful and for the sole purpose of determining defense strategy. *See Ott v. State*, 627 S.W.2d 218, 224 (Tex. App. - Ft. Worth 1982, pet. ref'd). In *Zarzour* the Fifth Circuit Court of Appeals held that an intrusion by government upon the confidential relationship between a defendant and his attorney is a violation of the Sixth Amendment right to counsel. *Id.* Meanwhile, in *U. S. v. Rosner*, 485 F.2d 1213 (2nd Cir. 1973), it was held that a finding of unlawful intrusion must be made before an intrusion into attorney- client communications would warrant a reversal under the Sixth Amendment.

In *O'Brien v. U.S.*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967), a hidden government microphone revealed privileged conversations between the accused and his lawyers regarding the accused's upcoming trial. The Supreme Court reversed and remanded for a new trial even though the recorded conversations were never disclosed to the prosecutor who tried the case. 386 U.S. at 345, 87 S.Ct. at 1159.

Meanwhile, in *Black v. U.S.*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966), F.B.I. agents installed a listening device in a hotel suite. They monitored and taped conversations held in the hotel suite during the period in which an offense was being investigated,

beginning some two months before and continuing until one month after the evidence in the case was presented to a Grand Jury. 385 U.S. at 27, 87 S.Ct. at 191. During that period, agents overheard exchanges between the accused and his attorney. Recordings of such interceptions were later erased but notes summarizing and sometimes quoting the conversations were available. The summaries were not seen by prosecutors until after the trial began. The assigned prosecutors asserted that they found nothing in the F.B.I. reports or memoranda relevant to the particular investigation. 385 U.S. at 28-29, 87 S.Ct. at 191. Nevertheless, the Supreme Court reversed, finding a 6th Amendment infringement significant enough to warrant a new trial. 385 U.S. at 29, 87 S.Ct. at 192.

The instant case presents facts more egregious than the above cases since in those cases, the trial prosecutors were not actively seeking to discover privileged material. In the instant case, the trial prosecutors sought out Appellant's personal writings in what was obviously an effort to discover matter which could have assisted the State in preparing for trial. This effort took place before trial and after jail officials seized Appellants' personal writings from his living area. Whether motivated by a desire to discover defense strategy, or to accumulate more evidence against Appellant, the prosecutors' action were improper at best, considering that some documents were plainly titled "Michael & Jane" (Appellant's trial counsel), and "Questions for my lawyers." (R.L,10-12). The trial court judge correctly determined those particular documents to be protected by the attorney/client privilege, which necessarily leads to the conclusion that the State infringed upon the attorney/client privilege in this case.

Rather than first tendering the documents to the trial judge for an *in camera* inspection, and rather than attempting to seek a subpoena setting forth probable cause, the trial prosecutors, on their own accord, invaded the attorney/client relationship. To allow this infringement to go unchecked will only encourage this conduct in the future and will have a chilling effect on attorney/client communication between attorneys and citizens too poor to bond out of jail. Without the conditional freedom of a pretrial bond, detained citizens are limited in their ability to communicate with their attorneys. Many, like Appellant, must write notes "for my lawyers" while confined awaiting trial. To allow prosecutors unfettered freedom to review whatever personal writings the jailor seizes is a dangerous precedent.

The trial prosecutors, upon seeing that some of the documents were related to the attorney/client relationship, charged head-first into the protected and confidential relationship between attorney and client. In doing so, Appellant due process rights were violated. As a result, the trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO. 12, RESTATED

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT VENUE FOR THE OFFENSE WAS WITHIN THE BOUNDARIES OF DALLAS COUNTY. (C.I,179-180) (R.L,22) (R.LII,2).

The jury charge authorized conviction upon proof that Appellant caused the complainant's death by shooting the complainant, while in the course of committing or attempting to commit kidnapping or robbery. (C.I,181). The jury charge further instructed the jury that venue was proper in the following counties:

1. Where the offense was committed,
2. Where property is stolen in one county and removed to another,
3. Where a person is injured in one county and dies in another,
4. Where a person was kidnapped and any county through which they were taken,
5. Where the accused resides, was apprehended, or extradited.

(C.I,179-180).

As to venue, Appellant first objected at the close of the State's case and sought a directed verdict on the basis that the evidence was insufficient to prove venue in Dallas County. (R.L,22). Appellant's objection was overruled. Appellant next objected when the above venue options were included in the court' charge on guilt/innocence, and essentially asserted that venue should be limited to that applicable in a homicide. (R.LII,2). Counsel further asserted that if venue were restricted in the requested manner, the evidence was insufficient to prove venue in Dallas County. Appellant's objections to the charge were

overruled and the jury was allowed to consider all the above venue options.

Applicable Law

There is a distinct difference between jurisdiction and venue. Jurisdiction concerns the authority or power of a court to try a case, while venue has to do with the place or county where a case may be tried. *Etchieson v. State*, 574 S.W.2d 753, 759 (Tex. Crim. App 1978). A plea of not guilty puts in issue an allegation of venue and the State must prove a venue allegation for a conviction to be warranted. *Black v. State*, 645 S.W.2d 789, 790 (Tex. Crim. App. 1983). A defendant's motion for instructed verdict that specifically challenges proof of venue timely raises the issue and preserves it for appellate review. *Cunningham v. State*, 848 S.W.2d 898, 901 (Tex.App.-Corpus Christi 1993, pet. ref'd). Failure to prove venue in the county of prosecution is reversible error. *Id.* at 792; *Sixta v. State*, 875 S.W.2d 17, 18 (Tex.App.--Houston [1st Dist.] 1994, pet. ref'd).

No specific venue statute sets forth the requirements for venue in capital murder cases. Appellant therefore asserts that venue is determined by TEX.CODE CRIM. PROC. art. 13.18, which provides that if venue is not specifically stated, the proper county for the prosecution of offenses is the county in which the offense was committed. See *Id.*

Appellant asserted at trial that defining "the county in which the offense was committed" should, in a capital murder case, be confined to that applicable to homicide. TEX. CODE CRIM. PRO. article 13.07 provides that "[i]f a person receives an injury in one county and dies in another by reason of such injury, the offender may be prosecuted in the county where the injury was received or where the death occurred, or in the county where

the dead body is found.” Appellant requested that venue in the case be restricted to the underlying homicide, not to the aggravating circumstances making the homicide offense a capital murder. If venue were restricted as requested by Appellant at trial, the evidence would have been insufficient to prove Dallas County.

The complainant was last seen alive in Collin County, Texas, at the Collin Creek Mall. (RXLVII,38-39). Her body was recovered was in Van Zandt county. (RXLVIII,123). When Appellant was in custody, he was driven around in an attempt to ascertain the location where the complainant was abducted and shot. Appellant was not able to identify any location in Dallas County where either the abduction or the shooting occurred. (RXLVIII,170-173&210-211). In Appellant’s written statement, he indicated that after leaving Bleacher’s Bar, he was walking towards highway 635 when he asked the complainant for a ride. The complainant agreed and after “some distance,” they pulled into a parking lot. At that unknown location, Appellant first told the complainant he was putting her in the trunk and that he would later call police and notify them. While placing her in the trunk, the shooting occurred. (RXLVIII,183-184).

Appellant asserts that the above evidence is insufficient to prove venue in Dallas County, and that Appellant’s timely objection to the trial court’s venue instructions should have been sustained. Therefore, the trial court judgement should be reversed and the case remanded for a new trial.

POINT OF ERROR NO. 13, RESTATED

THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUEST TO SUPPRESS THE UNDULY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT MADE BY COMPLAINANT SHERRYL WILHELM, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the punishment phase of trial, the State presented evidence that Appellant abducted Sherryl Wilhelm from a parking lot of a hospital in Arlington, Texas in August, 1997. Defense evidence showed that Appellant denied that he was in any way involved in this offense.

Sherryl Wilhelm was employed at Arlington Memorial Hospital in 1997. On August 26, 1997, during her lunch break, she walked out to the parking area, planning on having lunch in her car. As she opened her car door, she was pushed from behind and forced into the car. A man followed her into the car, telling her he would not harm her, that he just needed a ride. After she attempted to get out of the car, the man then put his hands around her neck and started to choke her. The man then ordered her to the floorboard as he drove the two out of the parking lot. After a short time, Wilhelm jumped out of the car. A motorist then stopped and helped her. Once at the hospital, she gave police officers a description of the individual. However, in October of 2000, Wilhelm was watching TV when she saw the news story about complainant Bertie Cunningham's disappearance. She then saw a

composite drawing of the suspect and recognized the individual from her own offense. She then contacted the police. (RLIII,125-153). However, at a hearing outside the presence of the jury, Wilhelm looked around the courtroom and failed to identify Appellant as the individual that abducted her. (R.XLV,106).

John Stanton was a detective for the City of Arlington and investigated the offense involving Wilhelm. He arranged to have Wilhelm meet with Officer Doug Ligon to create a composite sketch using a computer. (RLIII,184-185). In October of 2000, Wilhelm contacted Stanton and stated she had seen a recent TV news story involving complainant Bertie Cunningham and after seeing a suspect image on TV, she believed she recognized that individual as the same individual that kidnaped her. Stanton then obtained a photograph of Appellant from the Van Zandt County Sheriff's Department, placed it in a photographic lineup and showed it to Wilhelm. Wilhelm then picked Appellant's photograph from the lineup. In identifying Appellant, Wilhelm stated she was "virtually sure that was the guy." (RLIII,197).

After a pretrial hearing, Appellant objected to introduction of the photographic identification of Appellant on the basis that individuals of other races were included among the photographs, making the photographs unduly suggestive. (R.LIII,125). Appellant's objection was overruled and the State introduced the photographic line-up as State's Exhibit No. 142. (R.LIII,168-169).

In the punishment phase of trial, the record shows that Leon Peek, who held a Bachelor of Science in psychology, a Master of Science in Clinical Psychology and a Ph.D.

in psychology, was involved in research and study involving human memory in relation to perception. Part of his study involved police lineups. (R.LIV,42-45). He reviewed Appellant's photograph which appeared in the photographic lineup viewed by Wilhelm years later. (R.LIV,45-46). Peek noted that the photographic lineup which was shown to Wilhelm was flawed because at least two of the individuals appeared to be Hispanic, while a third individual had "rosy" cheeks, all of which blatantly conflicted with the description given by Wilhelm to police. (R.LIV,53-54). Additionally, one of the individuals in the photo spread appeared be considerably older than the age range Wilhelm gave police. (R.LIV,54).

Applicable Law

When reviewing a trial court's ruling on the admissibility of an identification which has been attacked as having been the product of an impermissibly suggestive pre-trial identification procedure, "[t]he test is whether, considering the totality of the circumstances, 'the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App.1998)(quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). The goal of the review is to determine the reliability of the identification procedure. *Id.* This Court has held that the following five non-exclusive factors should be weighed against the improper effect of any suggestive identification procedure in assessing reliability under the totality of the circumstances:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness' degree of attention;

3. The accuracy of the witness' prior description of the criminal;
4. The level of certainty demonstrated by the witness at the confrontation, and
5. The length of time between the crime and the confrontation.

Id., citing *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Each of these "*Biggers* factors" are historical facts, and should be viewed deferentially, in the light most favorable to the trial court's ruling. *Id.* at 773. The application of the factors, and thus the "ultimate conclusion as to whether the facts as found state a constitutional violation, is a mixed question of law and fact." *Id.* Therefore, a trial court's application of the factors is reviewed *de novo*. *Id.* at 773-74.

Application of Law to Facts

Applying the *Biggers* factors to the instant case, Appellant asserts that the factors preclude admission of the unduly suggestive lineup. Wilhelm did not had ample time to view the man who forced her from behind into her car, and who then forced her to place her head against the car seat. Further, it was not until she saw Appellant's picture on TV that she ever identified Appellant at all. It was only after seeing Appellant's picture on TV that she viewed a highly suggestive photo-spread and picked Appellant's photograph. Yet even after that, she was initially unable to identify Appellant in open court. Appellant asserts that even if viewed in a light favorable to the trial court's rulings, the trial court erred in refusing to suppress the photographic lineup and Wilhelm's out of court identification of Appellant. Not only was the photographic lineup unduly suggestive, the circumstances of the case indicate that Wilhelm's identification of Appellant was highly suspect. Appellant was denied due process

of law by the admission of the identification. *See Simmons*, 390 U.S. at 385-86, 88 S.Ct. 967.

The case should be reversed and remanded.

POINT OF ERROR NO.14, RESTATED

THE TRIAL COURT ERRED IN THE PUNISHMENT PHASE BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION WHICH WOULD HAVE REQUIRED THE JURY TO CONSIDER EXTRANEIOUS OFFENSES ONLY FOR THE PURPOSE OF DETERMINING FUTURE DANGEROUSNESS IN SPECIAL ISSUE NUMBER ONE. (C.I,213&148-150) (R.LX,2)

In the punishment phase, the jury was instructed pursuant to TEX. CODE CRIM. PROC. art.37.071 as follows:

Special Issue No. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 2

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence

be imposed? (C.I, 213).

Appellant made a timely request that the jury's consideration of extraneous offenses be confined to determining whether the State proved Appellant's future dangerousness beyond a reasonable doubt. Appellant sought to have the jury instructed not to consider extraneous offenses in answering Special Issue No. 2. (R.LX,2)(C.I,148-150). Appellant's request was denied and the jury was thereby allowed to consider extraneous offense evidence in answering Special Issue No. 2.

Law

Evidence of extraneous offenses can be relevant to the future dangerousness in the punishment phase of a capital case, and in most cases, extraneous offenses will be admitted to facilitate the prediction whether the defendant will constitute a future danger to society. *Ex parte Broxton*, 888 S.W.2d 23, 28 (Tex. Crim. App. 1994); *Powell v. Sate*, 898 S.W.2d 821, 830 (Tex. Crim. App. 1994); *Marquez v. State*, 725 S.W.2d 217, 226 (Tex. Crim. App. 1987). In fact, when predicting future dangerousness, the jury is permitted to consider several factors, including:

- (1) the circumstances of the capital offense, including the defendant's state of mind and whether he or she was acting alone or with others;
- (2) the calculated nature of the defendant's acts;
- (3) the forethought and deliberateness exhibited by the crime's execution;
- (4) the existence of a prior criminal record, and the severity of the prior crimes;

(5) the defendant's age and personal circumstances at the time of the offense;

(6) whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

(7) psychiatric evidence; and

(8) character evidence.

See Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App.1987).

Special Issue Number Two, however, is fundamentally different than the issue of future dangerousness presented in the first Special Issue. In *Jurek v. Texas*, 428 U.S. 262, 272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976), the Supreme Court determined that the constitutionality of Texas' death penalty scheme turns on whether the jury is allowed to consider particularized mitigating factors. *Jurek* concluded that Texas' sentencing scheme satisfied the Eighth Amendment on the basis that Texas courts would interpret the question concerning future dangerousness so as to allow capital juries to consider whatever mitigating circumstances a defendant may be able to show. *Id.*, at 272-273, 96 S.Ct., at 2956-2957. Supreme Court decisions since *Jurek* have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a plurality of the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death.” *Id.*, at 604, 98 S.Ct., at 2964 (emphasis in original). The constitutionality of Texas’ scheme “turns on whether the enumerated questions allow consideration of particularized mitigating factors.” *Supra*, 428 U.S., at 272, 96 S.Ct., at 2956.

The U.S. Supreme Court has consistently reaffirmed the fundamental principle that, in a capital case, “the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.” *Weeks v. Angelone*, 528 U.S. 225, 233, 120 S.Ct. 727, 732, 145 L.Ed.2d 727 (2000); see also, *Hitchcock v. Dugger*, 481 U. S. 393, 394 (1987), *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). While the “State may structure the jury’s consideration of mitigation” it may “not preclude the jury from giving effect to it.” *Weeks*, 120 S.Ct. at 732. The Supreme Court has held that the U.S. Constitution permits states to institute jury instructions that “shape and structure” a capital jury’s consideration of mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702(1998). This “shaping and structuring” may not, however, impede the jury’s consideration of mitigating evidence in any way. The Supreme Court’s “consistent concern has been that restrictions on the jury’s sentencing determination not preclude the jury from being able to give effect to mitigating evidence.” *Id.* Therefore, there is a “need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.” *Id.*, citing, *Tuilaepa v. California*, 512 U.S. 967, 971-73 (1994). Anything less “does not permit the type of individualized consideration of mitigating factors ... required by the Eighth and Fourteenth Amendments in capital cases.” *Lockett*, 438 U.S. at

605.

The trial court's refusal to restrict consideration of extraneous offense evidence to consideration of future dangerousness precluded a fair consideration of the mitigation evidence applicable to Special Issue Number Two. Failure to limit extraneous offense evidence to Special Issue Number One crossed the line between permissible "structuring" of the jury's ability to consider mitigating evidence and unconstitutional "restriction" of the jury's ability to consider such evidence. By tethering the jury's ability to give effect to the substantial mitigating evidence presented, the trial court unconstitutionally restricted the jury's ability to give effect to Appellant's history of emotional problems arising out of the abuse he suffered as a child. Evidence of this type is unquestionably mitigating, since it potentially acted to serve "as a basis for a sentence less than death." *Skipper*, 476 U.S. at 4-5, quoting, *Lockett*, 438 U.S. at 604.

Appellant argues that without the requested instruction, the jury could not fully consider and give effect to the mitigating evidence of his abused childhood in rendering its sentencing decision where the jury was not required to consider mitigation apart from the extraneous offense evidence applicable to Special Issue Number 1. Therefore, the case should be reversed and remanded.

POINT OF ERROR NO. 15, RESTATED

**THE TRIAL COURT ERRED IN FAILING TO SUBMIT
IN THE JURY INSTRUCTIONS AT THE PUNISHMENT
PHASE OF TRIAL DEFINITIONS OF THE VAGUE,
UNDEFINED TERMS USED IN THE SPECIAL ISSUES
THAT EFFECTIVELY DETERMINE THE DIFFERENCE
BETWEEN A LIFE SENTENCE AND IMPOSITION OF
THE DEATH PENALTY. (C.I, 213)**

At the conclusion of the punishment phase, the trial court submitted to the jury the two statutory special issues⁵ as set out in Point of Error No. 14. (C.I, 213). The jury received no instructions concerning the meaning of the crucial terms in the special issues, specifically, the terms “probability,” “criminal acts of violence,” or “continuing threat to society.”

This failure to define the operative words and phrases violated the constitutional requirement that each statutory aggravating circumstance genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of the death penalty. *See Godfrey v. Georgia*, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Because the trial court failed to charge the jury in a constitutionally adequate manner so that its determinations are rationally reviewable, there was no rational process justifying the imposition of the death sentence upon this Appellant in comparison to other cases in which other defendants received a life sentence. This failure to properly instruct the jury violated Appellant’s rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

⁵TEX. CODE CRIM. PROC. ANN. art.37.071, §3(b)(1), (b)(2), (e).

The Texas special issues applied in this case function as aggravating circumstances. An aggravating circumstance is any finding by a capital sentencer which “circumscribe[s] the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). An affirmative finding to the first special issue and a negative response to the second comprise a finding on an aggravating circumstance as defined by the Supreme Court in *Zant*. When an aggravating circumstance is vague, however, it fails to serve its constitutionally mandated narrowing function. A sentence of death may not be imposed using a vague aggravating factor unless the state court cures such vagueness by applying a valid limiting construction, thereby providing the sentencer specific and detailed guidance concerning its scope. *Maryland v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

Because the Texas special issues contain terms that are unconstitutionally vague, any of the special issues are unconstitutional as applied to Appellant. His death sentence must therefore be vacated. *See Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *Lewis v. Jeffers*, 497 U.S. 766, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990).

In Texas, the Court of Criminal Appeals has held that the special issues perform the function of narrowing the class of death eligible defendants, and thereby comprise aggravating circumstances under the Constitution:

[T]he function of Article 31.071 [is] to further narrow the class of death-eligible offenders to less than all those who have been found guilty of (capital murder) as defined under § 19.03 (capital murder

statute).

Smith v. State, 779 S.W.2d 417, 419 (Tex. Crim. App.1988); *Roney v. State*, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982) (facts of crime alone do not provide death-eligibility, otherwise every murder in the course of robbery would warrant capital sentence).

However the Texas special issues cannot suffice as a framework for the imposition of the death penalty if the special issues themselves contain crucial terms that are undefined and inherently vague.

The Texas Court of Criminal Appeals has refused to apply any limiting construction to the unconstitutionally vague terms in the special issues. Special issues must channel sentencing discretion by adequately informing juries “what they must find to impose the death penalty.” *Maryland v. Cartwright*, 486 U.S. at 362, 108 S.Ct. at 1858, 100 L.Ed.2d at ____; *Godfrey v. Georgia*, 466 U.S. at 428, 100 S.Ct. At 1765, 64 L.Ed.2d at _____. Texas allows its capital juries virtually unfettered discretion in construing the statutory aggravating circumstances without the aid of specific definitions of crucial terms contained in the special issues. *Roney v. State*, 632 S.W.2d at 603. Yet that function is articulated through the use of the special issue questions, which employ broad terms that result in standardless capital sentencing determinations. Such a result runs directly counter to the Eighth Amendment’s requirement that there be a rational process for juries and appellate courts to decide who lives and who dies.

In the first special issue, the word “probability” has no common or uniform meaning. Jurors in the instant case were left to apply any possible interpretations of the word,

including: about fifty percent; a substantial likelihood; or, technically, any chance at all. Additionally, jurors were denied any meaning for the phrase “criminal acts of violence” or “continuing threat to society.”

The various words and phrases in the special issues, viewed individually or as a whole, did not provide the jury any uniform guidance in how to apply terms crucial to the decision to impose the ultimate sentence. In *Jurek v. Texas*, 428 U.S. at 272, 96 S.Ct. at 2956, 49 L.Ed.2d at ___, a plurality of the Supreme Court noted that “[t]he Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as “criminal acts of violence” or “continuing threat to society.” Twenty years later, the Court of Criminal Appeals still has not defined the vague terms in the first special issue *i.e.*, “probability,” “criminal acts of violence,” and “a continuing threat to society.” Such failure has rendered the first special issue unconstitutional. Appellant’s death sentence should be modified to life.

POINT OF ERROR NO. 16, RESTATED

THE TEXAS DEATH PENALTY SCHEME VIOLATED APPELLANT'S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY REQUIRING AT LEAST TEN "NO" VOTES FOR THE JURY TO RETURN A NEGATIVE ANSWER TO THE PUNISHMENT SPECIAL ISSUES.

Arguments and Authorities

All twelve jurors must answer the first special issue (future dangerousness) affirmatively before the trial court may impose the death penalty; a life sentence, on the other hand, requires that at least ten jurors answer the special issue negatively. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(d)(2) (Vernon Supp. 1999). Unanimity must also exist for the jury to enter a negative finding on the mitigation issue, while only ten jurors must vote to grant leniency. *See id.* § 2(f)(2). The trial court here instructed the jury accordingly. (C.I., 67-68). The failure of a capital jury to garner the requisite number of votes either way results in a life sentence. *See id.* § 2(g). Neither the trial court, parties, nor counsel may disclose to the jury members that their failure to unanimously agree on an answer to either special issue results in a life sentence. *See id.* § 2(a). This feature of article 37.071 creates the potential for considerable confusion among reasonable jurors.⁶

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The Supreme Court has held that, in judging the constitutionality of a capital sentencing statute, a court must ask how a reasonable juror could view his or her role under the statutory scheme. *See California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987); *Francis v. Franklin*, 471 U.S. 307, 315-16, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985).

A. The “Majority Rules” Harm Analysis

Texas’s 12/10 Rule generates the danger that confused jurors otherwise predisposed to hold-out on voting for a death sentence will conform to a “majority-rules” mentality. Potential holdout jurors may reasonably believe that their votes in favor of a life sentence are worthless unless nine others join them. If a majority of other jurors are firmly voting “yes,” holdouts may feel obligated to vote “yes” since there would appear to be no possibility of a life sentence and the jury has been instructed to return a verdict. See *Mills v. Maryland*, 486 U.S. 367, 383, 108 S.Ct. 1860, 1870, 100 L.Ed.2d 384, ___ (1988) (“common sense. . . suggest[s] that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation [citation omitted] unless they are expressly instructed to do so.”).

Support for this argument regarding minority juror “coercion” is found in the Supreme Court cases criticizing the practice by trial courts of inquiring into the numerical division of deadlocked juries prior to sending the jury back for further deliberations. See, e.g. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40, 108 S.Ct. 546, 552, 98 L.Ed.2d 568, __ (1988); *Brasfield v. United States*, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345 (1926). In such cases, the Supreme Court has held that “ inquiry into the jury’s numerical division necessitated reversal because it was generally coercive and almost always brought to bear “in some degree, serious although not measurable, an improper influence upon the jury.” *Lowenfield v. Phelps*, 484 U.S. at 239, 108 S.Ct. at 552, 98 L.Ed.2d at __, citing *Brasfield v. United States*, 272 U.S. at 450, 47 S.Ct. at 136, 71 L.Ed.2d at __.

Put another way, Texas's 12/10 Rule is a built-in impermissible "dynamite charge," which has been recognized as a possible Eighth Amendment violation in the capital sentencing context. *See Lowenfield v. Phelps*, 484 U.S. at 240-41, 108 S.Ct. at 522, 98 L.Ed.2d at _____. In this way, Article 37.071's 12/10 Rule injects arbitrariness into the proceedings and creates the potential for unreliable sentencing determinations - a constitutional violation of the highest order in the capital sentencing context. *See State v. Williams*, 392 So.2d 619, 631 (La. 1980) (on rehearing). In *Williams*, the court stated:

In the present case the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. . . *Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was no unanimity.* Under these circumstances, individual jurors could rationally surmise that in the event of a disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required. [emphasis added.] *Id.*

Such a risk of speculation and confusion was held to be a constitutional violation by the Louisiana Supreme Court. *Id.*

B. The *Mills* Principle

The 12/10 Rule also violates the Eighth Amendment principle in *Mills v. Maryland*, that it is unconstitutional to instruct capital sentencing jurors in a manner leaving reasonable jurors to believe that their individual vote in favor of returning a life sentence based on particular mitigating factors is worthless unless some threshold number of jurors agree that particular mitigating factors exist. That is, a constitutional violation occurs if a reasonable juror could interpret the jury charge to instruct the jury that there must be a meeting of the

minds among some threshold number of jurors⁷ as to whether the mitigating evidence offered by the capital defendant warrants either a negative answer to the first special issue, or an affirmative response to the second, thus resulting in the imposition of a life sentence. *Mills v. Maryland*, 486 U.S. at 373-75, 108 S.Ct. at 1864-65, 100 L.Ed.2d at _____. Unless jurors are informed of the result of a deadlock in such a situation, the risk that one or more jurors will give into a “majority rules” mentality is too great under the Eighth Amendment.

C. The *Mills* Principle As Applied in Texas

Under *Mills*, a constitutional violation would occur under the Texas scheme if reasonable jurors who were instructed pursuant to Article 37.071 were led to believe that their votes in favor of a life sentence based on particular mitigating factors would be worthless unless at least nine other jurors joined them. In *Kubat v. Thierot*, 867 F.2d 351, 369-73 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989), while finding a *Mills* violation, the Seventh Circuit was faced with a capital sentencing scheme similar to the one at issue in the present case:

Kubat’s jurors were never expressly informed in plain and simple language that even if one juror believed that the death penalty should not be imposed, Robert Kubat would not be sentenced to death. . . [T]here is a substantial possibility that one or more of Kubat’s jurors might have been precluded from granting mercy to Kubat because of a mistaken belief that the sufficiency of mitigating factors had to be found unanimously.

Id. at 373.

⁷Under *Mills*, the threshold number was twelve, while in Texas, the threshold number is ten.

Therefore, reasonable jurors could have believed that they had no ability to give mitigating effect to *any and all types of mitigating circumstances* unless at least nine other jurors also voted for life. Because “there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant [mitigating] evidence,” *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, _____ (1990), Appellant was sentenced to death in an unconstitutionally manner. For these reasons, the judgment of the trial court should be reversed and the cause remanded for a new trial.

POINT OF ERROR NO. 17, RESTATED

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE PROCESS OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

POINT OF ERROR NO. 18, RESTATED

THE TEXAS DEATH PENALTY SCHEME DENIED APPELLANT DUE COURSE OF LAW, AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE I, SECTIONS 13 AND 19, OF THE TEXAS CONSTITUTION BECAUSE OF THE IMPOSSIBILITY OF SIMULTANEOUSLY RESTRICTING THE JURY'S DISCRETION TO IMPOSE THE DEATH PENALTY WHILE ALSO ALLOWING THE JURY UNLIMITED DISCRETION TO CONSIDER ALL EVIDENCE MILITATING AGAINST IMPOSITION OF THE DEATH PENALTY.

Arguments and Authorities

Justice Blackmun of the United States Supreme Court recently concluded that the death penalty, as currently administered in this country, is unconstitutional. *See Collins v. Collins*, 510 U.S. 1141, ___, 114 S.Ct. 1127, 1129, 127 L.Ed.2d 435, 449 (1994) (Blackmun, J., dissenting). Justice Blackmun summarized his position in the following excerpt:

...Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct.2d 346 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see *Furman v. Georgia*, *supra*, can never be achieved without compromising an equally essential component of fundamental fairness--individualized sentencing. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

It is tempting, when faced with conflicting constitutional commands, to sacrifice one for the other or to assume that an acceptable balance between them already has been struck. In the context of the death penalty, however, such jurisprudential maneuvers are wholly inappropriate. The death penalty must be imposed "fairly, and with reasonable consistency, or not all." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due to the uniqueness of the individual." *Lockett v. Ohio*, 455 U.S. at 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (plurality opinion). That means affording the sentencer the power and discretion to grant mercy in a particular case, and probing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice. Finally, because human error is inevitable, and

because our criminal justice system is less than perfect, searching appellate review of death sentences and their underlying convictions is a prerequisite to a constitutional death penalty scheme.

On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable. Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, see *McLeskey v. Kemp*, 481 U.S. 279, 313, n 37, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. [Footnote omitted.] Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can see the death penalty from its inherent constitutional deficiencies. The basic question--does the system accurately and consistently determine which defendants "deserve" to die?--cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, see, e.g. *Arave v. Creech*, 507

U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993), and relevant mitigating evidence to be disregarded, see, e.g. *Johnson v. Texas*, 509 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution. [Footnote omitted].

Callins v. Collins, 510 U.S. at ___, 114 S.Ct. at 1129-30, 127 L.Ed. At 437-39. Justice Blackmun then discussed the “narrowing” of death-eligible offenders according to objective, fact-bound criteria; and the jury’s subsequent discretion to consider relevant mitigating evidence. *Id.* at ___, 114 S.Ct. at 1134, 127 L.Ed.2d at 444. Over time, Justice Blackmun came to conclude that this procedure simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing. *Id.* at ___ & n.4, 114 S.Ct. at 1134, 127 L.Ed.2d at 444 (citing Gillers, *Deciding Who Dies*, 129 U.Pa.L.Rev. 1, 27-28 (1980) (inherent arbitrariness of death penalty only magnified by post-*Furman* statutes allowing juries to choose among similarly situated defendants). He concludes the opinion with a lengthy reference to the role that racism plays in a defendant’s chance of being executed, and the diminished protection now afforded by federal courts exercising habeas corpus jurisdiction. *Callins v. Collins*, 510 U.S. at ___, 114 S.Ct. at 1135-38, 127 L.Ed.2d at 446-49.

The Texas capital sentencing scheme fails to adhere to principled guidelines in weighing punishment evidence. The focus upon aggravating circumstances, to the exclusion of mitigating evidence, clearly violates the constitutional mandate of individualized sentencing. See *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d

256, 278-79 (1989). The federal and state constitutions prohibit the imposition of the death penalty until a scheme is employed which eliminates the sentencer's total discretion to inflict death while simultaneously permitting unrestricted consideration of mitigating evidence. Therefore, this Court should commute Appellant's death sentence to imprisonment for life.

POINT OF ERROR NO. 19, RESTATED

THE CUMULATIVE EFFECT OF THE ABOVE-ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

POINT OF ERROR NO. 20, RESTATED

THE CUMULATIVE EFFECT OF THE ABOVE-ENUMERATED CONSTITUTIONAL VIOLATIONS DENIED APPELLANT DUE COURSE OF LAW UNDER ARTICLE 1, SECTION 19, OF THE TEXAS CONSTITUTION.

Arguments and Authorities

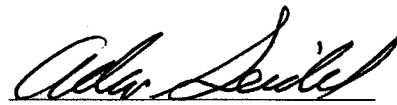
Due process in both the federal and state constitutions requires that Appellant receive the fundamental fairness necessary to the due administration of justice. *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166, __ (1941); *Reese v. State*, 877 S.W.2d 328, 333 (Tex. Crim. App. 1994). Appellant cites many constitutional and statutory violations in the points of error contained in Appellant's Brief. If this Court deems

that none of these reasons taken alone justify reversing the trial court's judgment, then Appellant prays the Court consider the cumulative effect of the errors in the trial court. Constitutional breaches so permeated the voir dire and trial of Appellant's case so as to deprive him of the "fundamental fairness" implicit in the Fifth and Fourteenth Amendments, as well as Article I, Section 19. Consequently, the trial court's judgment should be reversed, and the cause remanded for a new trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, there being reversible error appearing in the record of the trial of the case, Appellant prays this Honorable Court reverse the judgement of the trial court and remand the case for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Adam L. Seidel", written over a horizontal line.

Adam L. Seidel
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Brief was deposited postage prepaid in the United States Mail, first class, in an envelope properly addressed to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, on this the 24th day of June 2002.



Adam L. Seidel

CERTIFICATE OF APPELLATE COUNSEL

I hereby certify that the foregoing Appellant's Brief was deposited postage prepaid in the United States Mail, first class, in an envelope properly addressed to the Clerk, Texas Court of Criminal Appeals, P.O. Box 12308, Capital Station, Austin, Texas, 78711, on this the 24th day of June 2002.



Adam L. Seidel

APPENDICES

APPENDIX A

Charles McKinney was the Assistant Chief Deputy in charge of inmate housing at the Dallas county jail. (R.XLIX,11-12). With regard to papers in the possession of an inmate, the Dallas County Sheriff's Department's policy allows for certain instances where those papers can be seized. The first would be under a court order issued by a judge. The second instance would be in the event the paperwork became so great in an amount that it became a safety or health hazard. Finally, in the event the cell became a crime scene, the documents could be confiscated as physical evidence. (R.XLIX,15-16). A crime scene could include an attempted suicide. (R.XLIX,15-16). Any documents which may be seized by the Sheriff's department would not normally be turned over to the district attorney's office unless by subpoena or court order. (R.XLIX,20-22).

Ray LaPere was a deputy sheriff for Dallas county and was the property and evidence officer. (R.LI,41-42). On May 22, 2001 LaPere received a call from the prosecutors asking if they could view Appellant's writings. LaPere then met Miller and Davis in the property room where he opened the envelope, pulled out Appellant's paperwork and allowed the prosecutors to view the contents. (R.LI,42). The prosecutors did not have a subpoena for the documents nor any court order. Copies were made of whichever documents the prosecutors desired. (R.LI,45).

Mary Miller, Assistant District Attorney for Dallas County, was co-counsel in the trial involving Appellant. In preparing for trial, she became aware that certain items had

been seized from Appellant's cell in the Dallas County jail after Appellant made an apparent suicide attempt. (R.L,2-4). She consulted with the lead prosecutor, Greg Davis, and then contacted an individual with the Sheriff's Department to determine the location of the property seized from Appellant's cell. (R.L,4). She and Greg Davis subsequently had a meeting with representatives of the Sheriff's Department and examined the paperwork taken from Appellant. While examining the documents, Miller requested that certain papers be photocopied by Sheriff's Department personnel. The copies were made at Miller's request and provided to Miller. (R.L,5). All of Appellant's writings were reviewed by either Miller or Davis prior to trial. (R.L,7).

Greg Davis, lead prosecutor in the trial, testified that he became aware from Ms. Miller that items belonging to Appellant had been seized from Appellant's cell in the jail. He viewed all of the written items seized by the Sheriff including handwritten notes by Appellant. (R.L,8-9). Among the documents reviewed by Greg Davis was a document entitled "Michael and Jane" referring to Appellant's trial counsel. (R.L,10). In another document he examined was titled "Questions for my lawyer," which contained paragraphs number 1-6, along with various other notes to his lawyers. (R.L,12). Davis testified that he did not use any information from Appellant's writing in preparing for trial. (R.L,13-14).

APPENDIX B

SUMMARY OF THE EVIDENCE

Evelyn Shelton had two sisters - the Complainant, Bertie Lee Cunningham, and Louise Frances Conner. Bertie Cunningham was 80 years old at the time of the offense. She resided in Garland, Texas and lived alone. (R.XLVII,22-24). On October 4, 2000, Shelton was visiting with her sisters, Bertie and Frances. Bertie indicated she intended to go to Collin Creek Mall and pick up an order from J. C. Penney's, as well as a robe for her sister, Frances. (R.XLVII,25-26). Bertie owned a 1996 Honda Accord. Bertie intended to use Frances' credit card to purchase items for Frances. Bertie also had her own credit cards as well. (R.XLVII,28). Bertie left the house and expected to return at approximately 3:00 p.m., so Shelton stayed with Frances. Shelton became concerned when Bertie did not return by 4:00 p.m. (R.XLVII,30-31). Shelton called the Garland Police Department when she became concerned about her sister. Some time later, she called back and made an official report of a missing person. Shelton then called credit card companies and canceled all her sister's credit cards except for the MasterCard which Shelton was not aware of. When calling the credit card companies, Shelton discovered that an unauthorized charge had already been made on Bertie Cunningham's card at a bicycle shop. (R.XLVII,32-35). When Bertie left the house that day, she was wearing her watch and ear rings which she normally wore. After Bertie's body was later found, Shelton never recovered the watch or rings. (R.XLVII,37-38). Shelton reviewed a videotape from J. C. Penney's at Collin Creek Mall and identified her sister arriving at the store at approximately 2:10 p.m. (R.XLVII,38-39).

Matt Tollesbol was the Senior Lost Prevention Manager for the J. C. Penney's store located at Collin Creek Mall. On October 4, 2000, the J. C. Penney's store at the mall had security cameras throughout the store which recorded both pictures and time. Garland police officers asked him to recover the security tapes from the day of the offense and, having retrieved those tapes, Tollesbol turned them over to the police. Tollesbol also recovered a receipt showing a purchase made at 2:55 p.m. with use of a credit card belonging to Frances Conner. (R.XLVII,43-47).

Kenneth Clancey was a bartender for a bar called Bleachers Sports Grill located in Garland. Clancey was working at the bar on October 4th. At approximately 1:00 p.m., Appellant came into the bar by himself. (R.XLVII,48-51). Clancey recognized Appellant because Appellant had been in before. Appellant sat at the bar and ordered drinks. (R.XLVII,51-52). Appellant did not appear to be intoxicated when he arrived at the bar. Clancey recalled speaking with Appellant who told Clancey that he had left his wallet in a cab earlier in the day. Clancey called the cab company on Appellant's behalf in an effort to recover the wallet. Appellant paid for his first drink with cash and then ordered a second drink. Before paying for the second drink, Appellant left and did not return. (R.XLVII,54-57). Clancey later spoke with officers from the Garland Police Department after seeing Appellant's picture on the news. (RXLVII,59).

Monty Dunn was a security manager for Washington Mutual Bank. On October 4, 2000, Washington Mutual had a branch located at 1225 East Beltline Road in Richardson.

An ATM machine was available at that location. The ATM machine required a personal identification number before dispensing cash. (R.XLVII,63,65). An unsuccessful attempt to withdraw cash from the machine would result in a report being forwarded to the credit card company used in the attempt. (R.XLVII,67).

Sandra Mamot lived in Richardson at the time of the offense. She was married and had two children, Zach (age 14) and Monica (age 11). (R.XLVII,70). On October 4, 2000 at approximately 5:30 p.m., Sandra was home with Zach when Appellant arrived. Zach referred to Appellant as "Uncle Jim." Appellant arrived in a car with his niece, Ashley. Appellant took Zach and Ashley and another person shopping. (R.XLVII,71-74). Appellant did not appear to be intoxicated or impaired in any way. (R.XLVII,75). Zach went with Appellant at approximately 5:30 p.m. Sandra next saw Appellant and her son Zach at a nearby park riding "Go-Peds," which were motorized scooters. Appellant apparently bought one for Zach. Sandra then met Zach back at home. (R.XLVII,76-78). Appellant was no longer with Zach. The next day, officers with the Garland police department came over took possession of Zach's Go-Ped. (R.XLVII,78).

Zachery Mamot was originally introduced to Appellant by Appellant's niece, Ashley Johnson. Over several months, Zach enjoyed playing basketball and other sports with Appellant. On October 4, 2000 at approximately 5:00 p.m., Zach arrived home and shortly after that, Appellant arrived. Appellant told Zach that Appellant had a new car and Appellant invited Zach to drive with him. Appellant told Zach that he had obtained the car from Appellant's girlfriend. Also with Appellant was his niece, Ashley Johnson. The car

that Appellant was driving was the type car owned by Bertie Cunningham. (R.XLVII,86-90). Appellant drove Zach and Ashley around, stopping first to buy beer and cigarettes. They then drove around looking for another friend, Ryan Hammonds, a friend of Zach's and Ashley's. They finally found Ryan who also got in the car and went riding with the group. While riding around, Appellant told the group again that he had obtained the car from his girlfriend and the Appellant also showed them two credit cards. (R.XLVII,90-93). The credit cards appeared to be similar to those belonging to Bertie Cunningham, although Zach never saw the name on the cards. (R.XLVII,93-94). Appellant said he had obtained the credit cards from his girlfriend who was allowing him to use them to purchase items. After dropping Ashley off at home, Appellant asked Zach and Ryan what they wanted to buy. Ryan suggested the Go-Peds and Appellant ultimately agreed. The group went to a Yamaha Shop on Central Expressway. (R.XLVII,94-95). Ryan and Zach each picked a Go-Ped as well as Appellant. Appellant used the credit cards to purchase the Go-Peds and when using the credit cards, Appellant informed the clerk that his last name was "Cunningham" and that the credit cards belonged to his mother. (R.XLVII,96-98). After purchasing the Go-Peds, the three test drove them on the side of the store before leaving. Upon leaving, Zach tried to open the trunk, but Appellant told him it was full. (R.XLVII,99-100). The group then dropped Ryan off at his house before returning to Zach's house. (R.XLVII,101). After that, Appellant and Zach rode their Go-Peds to Huffine's Park where they saw Zach's mom. After Zach and Appellant returned to Zach's house, Appellant showed Zach a gun that Appellant had in the middle compartment in the car. When showing the gun to Zach,

Appellant stated "that's how wanted I am right now." (R.XLVII,102-104). Appellant claimed that "the mob" was after him because Appellant owed them money. (R.XLVII,104). After that, Appellant left Zach's house and Zach never saw him again. (R.XLVII,105). Before leaving, Appellant counseled Zach about making the right choices, and informed Zach that Appellant had made many bad choices in his life and that Zach should not do the same. At that point, Appellant was crying and told Zach he would be leaving for Florida and not returning. (R.XLVII,105).

Bobby Harp worked at Richardson's Motor Sports and was the salesperson who sold the Go-Peds to Appellant. Appellant was the individual who used the credit cards to purchase the Go-Peds. (R.XLVII,121-125). Appellant used his real name when purchasing the items and filling out the warranty papers. (R.XLVII,126). During the transaction, Appellant did not appear to be intoxicated or under the influence of any drugs. (R.XLVII,131). After the purchase, the Go-Peds were loaded into the back seat of the car, which was a four-door silver Honda. The Honda appeared to be the same as the one owned by Bertie Cunningham. (R.XLVII,135-136).

Cesar De La Torre worked for Associates, assigned to monitoring and identifying fraudulent accounts for the bank. The Associates was in the business of issuing credit cards from the State of Delaware, usually MasterCard and Visas. On October 11, 2000, De La Torre was contacted by officers from the Garland Police Department and asked to do research concerning a credit card issued to Bertie Cunningham. Research was done on Cunningham's Master Card issued on Washington Mutual Master Card account number

5544-2600-1025-5141. Research was done for activity involving the card on October 4 through 5, 2000. Research indicated that on October 4th, the card was used at a ATM machine at a Washington Mutual location at 1225 East Beltline Road in Richardson; however, use was unsuccessful since the PIN number was not known to the user. (R.XLVII,1148-150). Two attempts were made at that time. Another attempt to withdraw cash was made later in the day at a different ATM location on Harry Hines Blvd. in Dallas. The following day, October 5th, the card was again unsuccessfully used at a Bank One location on Harry Hines in Dallas. The card was next used at a merchant's called "Chacho's" located in Terrell, Texas at 6:35 and 6:43 p.m.

Ozelle Wilcoxson was a justice of the peace for Van Zandt county. On October 6, 2000, Judge Wilcoxson received a telephone call at approximately 3:00 a.m. from a deputy with the Van Zandt County Sheriff's Department. The judge was originally asked to conduct an inquest. The judge met a sheriff's deputy at the Dairy Queen in Edgewood and then was asked instead to arraign a suspect. The judge proceeded to the Van Zandt County Justice Center, then to the Edgewood Police Department. Appellant was arraigned by the judge on two charges, credit card abuse and murder. During each arraignment, Appellant was advised of his "Miranda Rights." Appellant did not appear to be intoxicated at the time. (R.XLVIII,21-32).

Gary Rose was the first law enforcement officer that had any contact with the Appellant at Ora Mae Milton's house on the morning the Appellant was arrested. When Rose walked into the room, Appellant was still asleep. Rose awakened Appellant and placed

him in handcuffs. (RXLVIII,77-79). After a short conversation with Appellant, Rose proceeded outside to examine the complainant's silver Honda parked in front. Rose opened the trunk of the car after noticing blood on the rear bumper. Inside the trunk was a very strong odor consistent with blood. (R.XLVIII,81-83). After that, Rose had a conversation with police officer Jason Bonham, who told Rose that Bonham had spoken with Appellant at the scene and Appellant had stated the location of the complainant's body. Rose, Bonham, and Deputy Branch then drove to that location. (R.XLVIII,84-86). The three officers drove approximately two to three miles from Milton home to an area known as Livingston Creek. (R.XLVIII,87). This is the location where the complainant's body was found. (R.XLVIII,90). Rose then notified officers with the Garland Police Department and met with Detective Matt Myers at the Dairy Queen in Edgewood. (R.XLVIII,92-94). Rose later went to the Edgewood Police Department where Appellant had been taken to appear before Judge Wilcoxson. (R.XLVIII,95). After the arraignment, Appellant was taken by Garland police officers to the Garland jail. The location where the complainant's body was recovered was in Van Zandt County and not in Dallas County. (R.XLVIII,123). Rose also asked Appellant where the complainant's body was located. Appellant lowered his head and said "it was an accident. I didn't mean to shoot her." (R.XLVIII,124-125). Rose then asked whether the complainant was dead and Appellant responded yes. Appellant then said he didn't know where the body was, that someone else had put her in the trunk of the car and dumped her in the Dallas area. (R.XLVIII,124-125).

Garland Police Detective **Matt Myers** was the lead detective in the case involving the complainant's death. The investigation began as a missing person investigation. Myers and Let. Thompson traveled to Colin Creek Mall because that was the last location where the complainant had been seen. They then traveled to Richardson Motor Sports because they had received information that one of the complainant's credit cards had used at that location. The investigators then checked various roads between the complainant's residence and Collin Creek Mall looking for evidence. They later traveled to the complainant's home and met with her sister, Evelyn Shelton. Later, Myers returned to Richardson Motor Sports where they received the receipts for the purchases made by Appellant. At that time, they developed Appellant's name as a possible suspect in the case. They determined that Appellant's last known address was 1718 Barclay in Richardson. Surveillance was then set-up at that location in an effort to search for the complainant's car and Appellant. After a short time, Myers then went to Apollo Junior High School and met with Ashley Johnson and Tonya Thorp. Myers then went home for the evening and at approximately 2:00 a.m., received a call and returned to the police department. Myers then went to Edgewood, Texas and met with various law enforcement officers at the Dairy Queen. The group then went to Ora Mae Milton's home where they observed the complainant's car parked in front. Myers proceeded into the residence where he came in contact with Appellant who was in a back bedroom. Myers had a conversation with Appellant who was handcuffed in the room. (R.XLVIII, 130-147). Myers asked the Appellant where the complainant's credit cards were located and Appellant responded that they were located in the complainant's car outside.

(R.XLVIII,151-152). The credit cards were in fact discovered inside the vehicle. Appellant was then taken to the Edgewood Police Department. Later, he was taken to a creek in the area. (R.XLVIII,153). The purpose of returning to the creek was to try to locate the murder weapon. (R.XLVIII,157). After leaving the creek, Appellant was driven 45 minutes to the Garland Police Department. He was later taken to an interview room where he received his Miranda warnings. (R.XLVIII,158-162). After the warnings, Appellant indicated he wanted to cooperate. After a short time, Appellant was taken from the Garland Police Department and driven around in an attempt to ascertain the location where the complainant was abducted. They drove by Bleacher's Bar which was located in Dallas County and drove around several other locations in Dallas County. However, Appellant was not able to identify the location where the abduction occurred. (R.XLVIII,170-173). Appellant was able to point out different areas he "recognized" but never identified any of the areas as the location of the abduction. All the areas were within the boundaries of Dallas County. (R.XLVIII,173-174). Upon returning to the Garland Police Department, Appellant gave a written voluntary statement. Appellant was left alone to hand write a statement for approximately 20 to 30 minutes. (R.XLVIII,174-182). In Appellant's written statement, he indicated that after leaving Bleacher's Bar, he was walking towards 635 in an effort to hitchhike to Wills Point when he encountered the complainant and asked for a ride. The complainant agreed. After some distance, they pulled into a parking lot and Appellant told the complainant he was putting her in the trunk and that he would later call police and notify them. While placing her in the trunk, Appellant stated that he had a gun in his right hand and

that he switched hands because he has impaired use of his left hand and needed his right hand to close the trunk. As he reached for the trunk lid, he grabbed the gun with his left hand too hard and the gun went off accidentally shooting the complainant. Appellant described how he ultimately placed the complainant "at the bottom of Livingston Hill." (R.XLVIII,183-184). The road leading from Bleacher's Bar to 635 is Arapaho and is located in Garland. The area from Bleacher's south to 635 was located within the boundaries of Dallas County, Texas. (R.XLVIII,184-186). They were unable to establish any location in Dallas county where the Appellant abducted the complainant. Additionally, they were unable to establish any location within Dallas county where the complainant was shot. (R.XLVIII,210-211).

After Appellant gave his written statement, Det. Myers became aware that attorneys representing Appellant had arrived at the Garland Police Department. Appellant was immediately returned to the book-in area. The attorneys present were two of Appellant's trial attorneys, Michael Byck and Jane Little. (R.XLVIII,193-194). When Det. Myers interviewed a second time, the detective was aware Appellant had met with his lawyers. As a result, Det. Myers had Appellant initial new Miranda warnings which included five additional questions written onto the Miranda warning sheet. Those questions included, in general, whether Appellant had met with lawyers and he responded "yes" and whether the lawyers advised him not to talk to police officers, and Appellant responded "no." Finally, Myers had Appellant initial, indicating that the lawyers advised Appellant to cooperate with police officers. (R.XLVIII,257-258).

Charles McKinney was the Assistant Chief Deputy in charge of inmate housing at the Dallas county jail. (R.XLIX,11-12). With regard to papers in the possession of an inmate, the Dallas County Sheriff's Department's policy allows for certain instances where those papers can be seized. The first would be under a court order issued by a judge. The second instance would be in the event the paperwork became so great in an amount that it became a safety or health hazard. Finally, in the event the cell became a crime scene, the documents could be confiscated as physical evidence. (R.XLIX,15-16). A crime scene could include an attempted suicide. (R.XLIX,15-16). Any documents which may be seized by the Sheriff's department would not normally be turned over to the district attorney's office unless by subpoena or court order. (R.XLIX,20-22).

Jennie Duval was a medical examiner for Dallas County. (RXLIX,32). She performed an autopsy on the complainant on October 6,2000. (R.XLIX,35). Among the injuries noted by the doctor was a single gun shot wound to right portion of the forehead. (R.XLIX,42). Gunshot residue present at the wound location indicated that the barrel of the gun was against the skin when the gun was fired. (R.XLIX,44). A single .22 caliber bullet was recovered during the autopsy. (R.XLIX,53-54). The single gunshot wound caused the death of the complainant. (R.XLIX,54).

Lannie Emanuel was a firearm and toolmark examiner with the Southwestern Institute of Forensic Sciences. (R.XLIX,64). He examined the bullet recovered from the

complainant's body at autopsy and determined it to be consistent with a .22 caliber. (R.XLIX,65-66).

James Rogers was a forensic investigator with the Garland Police Department. On October 5, 2002, he went to 1718 Barclay in Richardson to collect evidence in the bathroom area of the home. He applied Luminol to the bathtub and shower wall for purposes of detecting the presence of blood. (R.XLIX,75-78). He noted a "very limited reaction" on the outside edge of the bathtub consistent with the presence of either blood or bleach. (R.XLIX,79). He next went to the home located at 2023 Portsmouth in Richardson to collect clothes and "Go-Peds." (R.XLIX,81). The following day he was dispatched to Edgewood, Texas at approximately 3:45 a.m. and ultimately went to the creek bed where the complainant's body was discovered. (R.XLIX,82-83). The complainant's body was located partially in the water in the creek. (R.XLIX,87). He then processed the complainant's car for evidence. (R.XLIX,88). Blood was detected inside the trunk area of the car as well as on the trunk lid. (R.XLIX,89-90). A bottle of Hennessy whiskey was recovered from inside the vehicle. Various items were recovered from inside the vehicle including beer and whiskey bottles and cigarettes packages. (R.XLIX,91-92). The complainant's purse was recovered from the trunk area. Also found in the complainant's purse were receipts from J.C. Penney's and Dillards both dated October 4, 2000, which included the purchase of a robe with a Discover card. (R.XLIX,97-98). Latent fingerprints were recovered from inside and outside the Honda Accord, as well as from cigarettes packages inside the vehicle. Latent prints were also recovered from various pieces of paper found inside the Honda. The

prints were then compared with the book-in fingerprints from Appellant. (R.XLIX,117-123). All of the recovered latent fingerprints matched those belonging to Appellant. (R.XLIX,127,129).

David Davenport was a criminalist with the Department of Public Safety Crime Lab in Garland, Texas. (R.XLIX,154). In November of 2000, he received several items from the Dallas County Medical Examiner's office related to the case, specifically, a blood sample belonging to the complainant as well as a known head hair sample also belonging to the complainant. He also received a sexual assault kit collected during the autopsy of the complainant. Examination of the sexual assault kit did not reflect any findings of sexual assault.(R.XLIX,155-156). Tests indicated that blood recovered from the trunk area of the complainant's car was human blood. Additionally, hair recovered from a rock near the complainant's body in the creek was consistent with the known hair samples from the victim. (R.XLIX,159-160).

John Donahue was a DNA analyst for the same crime lab. (R.XLIX,162). He received a DNA profile for the complainant and compared her DNA to blood samples from the trunk of her car, a J.C. Penney's bag recovered from the trunk and a white T-shirt also recovered from the trunk. The complainant's DNA matched blood samples from the trunk, the shopping bag and the T-shirt. (R.XLIX,165-170). Additionally, a blood stain recovered from 2025 Portsmouth was also consistent with that of the complainant. (R.XLIX,171). Also, DNA testing of hair recovered from the rock in the creek area also matched that of the complainant. (R.XLIX,172-173).

Shirley Bard was employed as a welder at R&R Designs in Terrell, Texas through January of 2001. Appellant, who Bard knew as "Jim Hines," was also a welder at R&R in early 2000. In order to do the type of welding that both she and the Appellant did, both hands were required. (R.XLIX,179-182). Bard supervised Appellant at work after training him. She never detected that Appellant had any problem using his left hand at work. (R.XLIX,183-185).

Harlan Bailey was also a welder and was employed at Griffin Products in June of 2000 when Appellant began working there. Appellant was hired as a welder and in the course of his work, was required to use his left hand. Bailey did not recall Appellant ever discussing an injury or problems with his left hand. (R.XLIX,186-189). While employed at Griffin, Appellant did injure his left thumb resulting in his leaving employment. (R.XLIX,189). Appellant later had surgery on his left thumb. (R.XLIX,190). After the surgery, Bailey spoke with Appellant regarding the surgery. Appellant indicated that he had no feeling in his left thumb and in fact hit it on a table indicating no feeling. (R.XLIX,190).

Dr. William Vandiver was an orthopedic surgeon in Kaufman, Texas. (R.XLIX,192-193). In June of 2000, Appellant saw the doctor as a patient after an accident at work involving his left thumb. Examination of Appellant's left thumb indicated that surgery was required and the doctor later performed that surgery. (R.XLIX,195). The doctor's opinion was that the surgery was successful after he repaired the torn ligament in the thumb. (R.XLIX,196-197). After the surgery, Appellant returned for an examination in July

complaining that his thumb was sore and that he had no sensation on the side of the thumb. (R.XLIX,197). Appellant returned again in August still complaining of numbness in his thumb. The doctor ordered that nerve conduction tests be performed on the left thumb in an effort to determine why Appellant had lost feeling in his thumb. Appellant told Dr. Vandiver that he had suffered a gun shot wound to his left hand in the palm area and that he had subsequently had several surgeries to that area involving the nerves. (R.XLIX,207-208). Records from 1996 indicated Appellant had suffered a puncture wound to the palm of his left hand as a result of being shot in the hand with a pellet gun. (R.XLIX,211).

Kirsten Adams was a worker's compensation adjustor for Trinity Insurance in Dallas. (R.XLIX,221). She adjusted the claim filed by Appellant related to his on-the-job thumb injury. As a result of the injury, Appellant did receive worker's compensation, but was subsequently released to return to light duty work after a period of time. Appellant's benefits ended shortly before the offense date. (R.XLIX,222-240).

Hearing outside the presence of the jury

Mary Miller, Assistant District Attorney for Dallas County, was the chief prosecutor assigned to the trial court and was co-counsel in the trial involving Appellant. In preparing for trial, she became aware that certain items had been seized from Appellant's cell in the Dallas County jail after Appellant made an apparent suicide attempt. (R.L,2-4). She was aware that certain papers were seized along with a razor blade used in the apparent attempt. She consulted with the lead prosecutor, Greg Davis, and then contacted an individual with

the Sheriff's Department to determine the location of the property seized from Appellant's cell. (R.L,4). She subsequently had a meeting with representatives of the Sheriff's Department to examine the paperwork recovered from Appellant. Certain papers were copied by Sheriff's Department personnel at Miller's request and the copies were provided to Miller. (R.L,5). Between she and her lead counsel, Greg Davis, all of defendant's papers were reviewed prior to trial. (R.L,7).

Greg Davis, lead prosecutor in the trial, testified that he became aware from Ms. Miller that items belonging to Appellant had been seized from Appellant's cell in the jail. He viewed all of the written items seized by the Sheriff including handwritten notes by Appellant. (R.L,8-9). Among the documents reviewed by Greg Davis was a document entitled "Michael and Jane" referring to Appellant's trial counsel. (R.L,10). In another exhibit titled "Questions for my lawyer," there were paragraphs number 1-6, along with various other notes to his lawyers. (R.L,12). Davis testified that he did not use any information from Appellant's writing in preparing for trial in any manner. (L,13-14).

Treshod Tarrant first saw Appellant at his grandmother's house shortly before Tarrant's parole meeting. Appellant initially appeared normal, however, some time later, he appeared somewhat "glassy eyed." (R.L,25-26). Tarrant believed Appellant had been drinking for some time and Tarrant saw five beers left out of an eighteen-pack of Bud Light beer. (R.L,26-27). After Tarrant reported to his parole officer, he returned to his grandmother's house and again saw Appellant. After that, the two headed to Terrell. (R.L,28). At one point, Tarrant saw that Appellant had a credit card with the name "Bertie"

on it, but he did not question Appellant regarding the card. (R.L,29). When the two went for dinner and drinks, Appellant did not eat his meal or drink his beer. (R.L,31-32).

Jason Bonham was a police officer who worked for the Wills Point Police Department. (R.L,62). He had been classmates with Appellant. On the evening that Appellant was arrested, Bonham was working as an off duty security guard when he became aware that the arrest team was gathering at the Dairy Queen to discuss the arrest of the Appellant. Bonham stopped by and indicated he knew Appellant and would help participate in the arrest since he had known the Appellant in school. (R.L,62-64). After Appellant was handcuffed, Bonham went and spoke with him in the bedroom in an attempt to determine the location of the complainant's body. Bonham reminded Appellant of a mutual friend who had committed suicide and whose body had been destroyed by animals prior to being discovered. Bonham indicated that if it was Appellant's mother or Bonham's mother, people would want to know where the body was before that could happen. Appellant began crying and after that, told Bonham where the complainant was located. (R.L,69-71). Later, Appellant told Bonham that the shooting was an accident, stating that the gun "just went off." (R.L,74). Bonham wondered how Appellant could have handled complainant's body by himself based upon the weight and size of the complainant. When Bonham asked Appellant if anyone had helped him place the body in the creek, Appellant indicated he had help, but would not state from who. Bonham asked whether Tarrant had helped Appellant, but Appellant would not answer. (R.L,78).

Edward Hueske was forensic scientist on the faculty of the University of North Texas in Denton in the Department of Criminal Justice. He was also a training coordinator for the University of North Texas Policy Academy in Denton, the regional police training facility for police recruits. (R.L,90). He was a private forensic consultant for approximately five years prior to trial. In the course of actually training officers, he was aware of the danger of unintentional discharges of fire arms. (R.L,91-92). He was specifically involved in training police recruits on how to avoid the unintentional discharge of their firearm in the course of their duties. There are primarily three ways in which an individual holding a firearm with their finger on the trigger can unintentionally discharge the weapon. The first is if they are startled, they can accidentally fire the weapon. The second is when the individual holding a gun with their finger on the trigger loses their balance and in an attempt to regain their balance unintentionally squeezes the trigger causing the weapon to fire. The third way is what is called "sympathetic firing" where a person holding the weapon carries out some manipulation with the other hand such as grabbing or squeezing, shoving or pushing that causes the hand holding the gun to squeeze the trigger simultaneously, causing an unintentional discharge. (R.L,91-94). As a result of sympathetic discharge, police officers are specifically taught not to carry out manipulation with one hand while holding their weapon with their finger on the trigger in the other. (R.L,94-95).

Dr. Nizam Peerwani was employed as a medical examiner for Tarrant, Parker and Denton counties. (R.L,104-105). He was also the chief medical examiner for Tarrant county. He examined autopsy photographs and reports conducted on the complainant in this

case. Having examined the evidence, Dr. Peerwani believed there was no evidence that the complainant died by drowning in water. (R.L,109). Having examined the gunshot wound that complainant suffered, the doctor believed that the complainant very quickly lost conscious after suffering the wound. (R.L,112). It could not be determined how long a person could have survived such an injury. (R.L,112-113). In fact, it would have been purely speculation to give an opinion on how long the complainant could have survived such an injury. (R.L,113).

Dr. William Vanvider examined medical records of Appellant and determined that one set of records conducted by Dr. Garrison indicated that Appellant's motor or nerve ability to move muscles in his hand were normal. Meanwhile, Dr. Krusz believed he saw abnormality in the nerves although slight. (R.L,127-128).

Dr. John Krusz was a board certified neurologist in private practice and an attending doctor at Presbyterian Hospital in Dallas. (R.LI,7-8). On June 1, 2001, he conducted a neurological evaluation of Appellant limited to his left upper extremity, specifically his left hand. Examination of Appellant indicated a significant decline in the ability to perceive light touch, temperature, pin-prick in all four digits on the left side of the left hand compared to his right hand. (R.LI,13). Nerve conduction studies performed on Appellant which comprised sending electrical impulses through the nerves of his hand indicated a "middle motor neuropathy." (R.LI,20). In fact, nerve conduction studies indicated a severe neuropathy below the wrist consistent with Appellant's history of injuries to his hand. (R.LI,22). Overall findings indicated finger strength to be weaker in the left hand. The

examination indicated the Appellant would loose some sensation or have some numbness in the fingers and thumb of his left hand. (R.LI,22-23). One affect could be that with eyes closed, the brain does not know where the tips of the fingers or where the side of the thumb is because the brain is depending on visual information where there's loss of feeling in the fingers and hand. (R.LI,23).

Ray LaPere was a deputy sheriff for Dallas county and was the property and evidence officer. (R.LI,41-42). There was an occasion in which the prosecutors assigned to the case came and looked at property seized from Appellant's cell. Specifically, on May 22, 2001 LaPere received a call from the prosecutors asking if they could view the evidence. He then met them in the property room where he opened the envelope, pulled out Appellant's paperwork and allowed the prosecutors to view the contents. (R.LI,42). They did not have a subpoena for the documents nor any court order. Additionally, copies were made of certain documents that the prosecutors desired. (R.LI,45).

Punishment Evidence

Elisabeth Erwin knew Appellant's parents before they adopted Appellant. (R.LIII,8-9). Appellant was approximately nine to eleven years old at the time he was adopted. He used to play and became friends with Erwin's son in Edgewood, Texas. On April 5, 1994, Erwin was living in Edgewood and t the time, the family had a safe they kept in the master bedroom. (R.LIII,10-11). Inside the safe was some cash, jewelry and significant documents. Erwin discovered that two payroll checks and some money, approximately \$1,000 to \$1,500

car. (R.LIII,37). She believed Tarrant had actually spent time in jail for the theft. (R.LIII,37). Appellant was placed on probation as a result of the theft offense and Erwin was to receive \$900 of restitution as a result of the burglary of a motor vehicle charge. (R.LIII,38). To-date, Erwin had received \$215 of the \$900 ordered as restitution. (R.LIII,40-41).

Glenn Thompson was a senior print technician for the Dallas County Sheriff's Department. He obtained a set of fingerprints from Appellant during trial for purposes of comparison. (R.LIII,47-49). Appellant's fingerprints matched those contained in three different exhibits. The exhibits were State's exhibits 128, 129, and 130. State's exhibit 128 was a "pen packet." (R.LIII,51-520). Records indicated Appellant had a charge of burglary of a motor vehicle occurring on May 26, 1994, for which he received a sentence of boot camp. (R.LIII,52). Paperwork indicated that after boot camp, Appellant was then placed on probation. (R.LIII,53). State's exhibit 129 was paperwork related to the State's jail felony offense of theft occurring on February 26, 1996 and a motion to revoke probation filed on October 6, 2000. (R.LIII,53). State's exhibit 130 appeared to be paperwork for a class B misdemeanor charge of driving without a license, to which Appellant entered a plea of no contest. (R.LIII,53-54).

Mike Sullivan was a sergeant with the DeSoto Police Department. On August 18, 1995, he was assigned to the auto theft task force as a detective for the Dallas County Commercial Auto Task Force. (R.LIII,57-58). On that date, he went to a Comfort Inn in Dallas searching for stolen cars and discovered a stolen car in the parking lot. (R.LIII,58-

59). The officer found a stolen Chevrolet pickup truck in the parking lot of the hotel. Later, two individuals got in the truck and left and were followed by police. However, the truck began to drive faster in an attempt to allude police. After three or four miles, the driver pulled onto the side of the road. The two individuals inside jumped out and began running. The truck continued to roll down the road in traffic. (R.LIII,59-62). Appellant was the passenger. (R.LIII,65).

Donald Alberty was a police officer for the City of Terrell. On March 14, 1996, he was on duty at approximately 10:15 p.m. when he saw a vehicle traveling with a headlight out. He followed the vehicle a short distance before coming in contact with Appellant who was the driver. (R.LIII,67-68). Appellant did not have proof of insurance nor did he have a driver's license. Additionally, the registration on the vehicle was expired. The steering column of the vehicle appeared to have been tampered with. Appellant allowed the officer to search the vehicle. Marijuana was discovered in a plastic bag on the back seat. There was a passenger seated in the front seat next to Appellant. (R.LIII,70-75). Appellant was charged with possession of marijuana and he subsequently pled guilty. (R.LIII,75-76).

James Lee was a police officer with the Wills Point Police Department. On August 17, 1997, he answered a call at 334 E. North Commerce in Wills Point, where he came in contact with Jean Evans and another woman who stated "he has a knife." The officer drew his weapon and entered the trailer. He went into a back bedroom and saw an individual standing with a knife in his hand. The officer was unable to identify Appellant in the courtroom. However, records indicated that the individual was named Jedidiah Isaac

Murphy. The officer ordered the individual to drop the knife. However the individual did not initially comply. The officer then sprayed the person with pepper spray, after which the individual fell to the floor and dropped the knife. Also present in the trailer was a female whose nose was bleeding, who stated that Appellant hit her. (R.LIII,77-86). The complainant, Chelsea Wills, later dropped charges. (R.LIII,88).

Sherryl Wilhelm was employed at Arlington Memorial Hospital in 1997. On August 26, 1997, she was on her lunch break and walked to the parking lot to have lunch in her car. As she opened her car door, she was pushed from behind and penned to the driver's side of the car. A man followed her into the car telling her he was not going to harm her, that he just needed a ride. The man pushed her into the passenger side seat. After she attempted to get out of the car twice, the man then put his hands around her neck and started to choke her. He ordered her to the floorboard, then ordered her to place her head on the seat. The man then drove the two out of the parking lot area, and after a short time, she decided to jump out of the car. She started to open the door, but the driver accelerated to a faster pace. She nevertheless jumped out of the car and hit the pavement. A motorist then stopped and helped her. Once at the hospital, she gave the police officer a description of the individual. No one was ever apprehended in connection with the case. However, in October of 2000, Wilhelm was watching TV when she saw a news story about complainant Bertie Cunningham's disappearance. She then saw a composite drawing of the suspect and believed she recognized the individual from her own offense. She then contacted the police. (R.LIII,125-153). However, in the instant case, at a hearing outside the presence of the jury, Wilhelm

looked around the courtroom and had failed to identify Appellant as the individual. She later identified Appellant with the jury present.

John Stanton was police detective for the City of Arlington. He investigated the offence involving Wilhelm and had her meet with Officer Ligon to create a composite sketch using a computer. (R.LIII,184-185). In October of 2000, Wilhelm contacted Stanton again and stated she had seen a recent TV news story involving complainant Bertie Cunningham and after seeing a suspect image on TV believed she recognized that individual as the same person that kidnaped her. Stanton then obtained a photograph of Appellant from the Van Zandt County Sheriff's Department, placed it in a photographic lineup and showed it to Wilhelm who picked Appellant's photograph. (R.LIII,197).

Mandy Kirl attended a graduation party in Edgewood, Texas in May of 1993. At the time, she was 19 years old. At the end of the party, she went with Appellant to collect fire wood. The two drove into a wooded area where Appellant produced a gun from underneath the seat and put it to her head, asking if she were afraid to die. Appellant pulled the gun away and placed it back under the car seat and the two returned to the party. Mandy never called the police. (R.LIV,2-13). In fact, she saw Appellant several more times at various parties and friends' houses.

Defense punishment evidence.

Leon Peek held a Bachelor of Science in psychology, a Master of Science in Clinical Psychology and a Ph.D. in psychology. He was also involved in research and review of

forensic psychology. Part of his research and study involved human memory in relation to perception. He also studied police lineups beginning in the mid-1980s. (R.LIV,42-45). He was present in court during the testimony of Sherryl Wilhelm related to her kidnaping. He also reviewed many of the exhibits that had been admitted into evidence including the composite drawing prepared by the Arlington Police with Wilhelm's assistance. He also reviewed Appellant's photograph which appeared in the photographic lineup viewed by Wilhelm years later. (R.LIV,45-46). He noted distinct differences between Appellant's photograph and the composite drawing prepared by police, and believed that Wilhelm's memory of the events that occurred in August, 1997 was substantially affected by the newspaper photographs that she viewed along with the television photographs. (R.LIV,47-48). Additionally, the photographic lineup which was shown to Wilhelm was flawed because at least of two the individuals appeared to be Hispanic, while a third individual has "rosy" cheeks, all of which blatantly conflict with the description given by Wilhelm to police. (R.LIV,53-54). Additionally, one of the individuals in the photo spread appears be considerably older than the age range given by Wilhelm to police. (R.LIV,54). Peek believed that Wilhelm 's identification of Appellant in court, after having failed to identify him in an initial hearing, was consistent with her memory being affected by television, news and other sources of information which affected her memory of the identification of her attacker. (R.LIV,55-56).

Murinene Olugbode worked as a jailer for the Dallas County Sheriff's Department. On May 6, 2001, at approximately 10:50 p.m. she was picking up inmate mail and request

forms when she walked into the middle of one of the "tanks" and noticed a pool of blood all over the floor and wall. She observed Appellant who was covered with a blood soaked blanket. She then called for her supervisor and others who responded to the location. (R.LIV,74-81). Appellant had suffered a cut on the neck and additionally had a cut on one of his wrist. (R.LIV,82). Appellant was later taken to Parkland Hospital for medical treatment. It was determined that Appellant inflicted the injuries upon himself with a razor blade. (R.LIV,84-85).

Kristi Sheets was a nurse assigned to the county jail. She responded to the call for a nurse when Appellant was discovered after his suicide attempt. When she arrived, Appellant was laying on his bunk covered with blood. Blood covered the floor. (R.LIV,93-94). She began to dress his injuries and an ambulance was called. Appellant returned from Parkland Hospital with stitches in his neck and wrist. (R.LIV,96-97).

John Rainey was also a deputy sheriff for Dallas county who worked in the jail. He was working in the jail control center when he heard repeated calls for a supervisor due to the incident involving Appellant. (R.LIV,98-100). He assisted Sergeant Gentry in dragging Appellant while on top of his mattress, out of the cell into an open area. He noticed a two inch laceration to the left side of Appellant's neck and another one inch cut on Appellant's left wrist. (R.LIV,102-103). The cut on the wrist was vertical, along the vein, consistent with a genuine attempt to kill himself. (R.LIV,104-105).

Jason Bonham, an officer with the Wills Point Police Department, arrived at the Dairy Queen as the arrest team was assembling to arrest Appellant. When he first heard that Appellant was the suspect in a capital murder, he believed the officers must have been "misinformed" because he had known Appellant ever since seventh grade and did not believe Appellant to be that type of person. (R.LIV,125). Bonham also believed that Appellant had help placing Bertie Cunningham's body in the creek area. (R.LIV,129).

Larry Reed was the chief investigator for the Dallas County Public Defender's Office and had been an investigator with that office for 18 years. Prior to that, he was a Dallas police officer for 13 years. He investigated the offense in which Appellant allegedly kidnapped Wilhelm from Arlington Memorial Hospital. In addition to photographing the parking lot, he drove the route that Wilhelm described taking after leaving the hospital parking lot. The distance from the hospital to the location where Wilhelm jumped out of the car was 4 miles and took Reed just 10 minutes to reach traveling the speed limit. (R.LVII,10-12).

Kevin Folmar was a police officer with the Wichita Falls Police Department. On August 26, 1997, he was dispatched to a Braum's restaurant where he interviewed an elderly woman who stated she had been robbed. He also spoke with a witness who observed the perpetrator running with the victim's purse. The victim was approximately 69 or 70 years old at the time. (R.LVII,13-18).

Kyle Cook was a detective with the Wichita Falls Police Department and investigated the robbery at the Braum's. The elderly victim described her attacker as a tall slender male with olive colored skin, possibly Hispanic or Anglo. (R.LVII,21-22). Property stolen from the elderly individual was later found in complainant's Wilhelm's vehicle which was taken from Wilhelm in Arlington. (R.LVII,23-24). A potential suspect was identified as a John Warren, however, palm prints recovered from the vehicle did not match Warren and there was no other evidence linking him to the offense therefore no charges were filed against Warren. (R.LVII,28). A witness named Ozuna who witnessed the purse snatching incident described the perpetrator as a Hispanic male weighing a 170 pounds. (R.LVII,31).

Roy Tolar was Appellant's older brother. When he was approximately 7 years old, he and Appellant left their parent's home. He described his upbringing in the family home as "normal, " except for physical fights between their parents. (R.LVII,72-73). Divorce resulted in the family breaking apart. When the family split, he, Appellant and a sister went to live with their father's parents, Margaret Ed Kines. The children lived there for several years until the Kines became too old and ill. After that, Appellant, his brother, and their sister were all placed in an orphanage. At the time, Appellant was approximately 5 or 6 years old. After a period of time, they were later adopted by the Tolar family. After going to live with the Tolars, problems began. The Tolars were abusive to Appellant and his brother and treated them differently than their biological children. Roy recounted one incident in which he had to defend Appellant who was being attacked by two or three members of the Tolar family. Due to conflict between the Tolars, Appellant and Roy, the Tolars decided to remove

Appellant and his brother from the home. After leaving the Tolar home, Appellant and his brother went to Fruitvale, Texas to a children's shelter. Sometime later, Appellant was adopted separately from his brother by Bob and Samantha Murphy of Edgewood, Texas. Roy went to live with a foster home who eventually raised him from that point forward. Neither he nor Appellant saw their mother again for many years, until Appellant was approximately 17 or 18 years old. (R.LVII,36-49).

Mat Murphy was one of Appellant's adopted brothers in the Murphy home. Appellant came to live with his family in the fifth grade. When Appellant came to live in the Murphy home, things went very smoothly. Mat and Appellant had a genuinely good relationship as brothers. The two mowed lawns together and helped care for elderly woman who lived nearby. When he and Appellant were 17, the Murphys divorced. Mat went to live with the mother, Samantha Murphy, and Appellant went to live with the father. Appellant's decision to live with his father resulted in his adopted mother writing Appellant off. (R.LVII,88-102).

Chelsea Willis first met Appellant when she was 15 years old. They moved in together when she was approximately 19. She became aware that Appellant had an alcohol addiction problem which led to confrontations between the two. Over the next several years, the two lived together off and on. Later, they had a child together named Alyssa, and Appellant was extremely involved in helping raise and support the child. She later had a second child with another man. As a result of Appellant's drinking, she and Appellant tried to admit Appellant to Terrell State Hospital but were refused admission. On two different

occasions, Chelsea had to have surgery and Appellant helped by either staying with her or babysitting the children. Chelsea described Appellant as a gentle person expect when abusing alcohol, which Appellant was not able to control. On one occasion, Chelsea recalled Appellant attempting to kill himself, close to 1998 or 1999 by taking sleeping pills. (R.LVII,110-138).

Pam Sherman was Appellant's cousin was related to Appellant's father, Donny Kines, who she recalled as someone who had been "mean since he was a child." As a child, Kines tried to burn others with cigarettes, to kill pet cats, and even tried to drown Sherman in a small lake near their house. Kines and his wife "fought constantly" and drank heavily. She also recalled how Kines would beat the children including Appellant with a belt. When the family fell on hard times, Sherman helped find the Tolars to adopt Appellant and his brother. (R.XLVII,165-177).

Randy Crow knew Appellant for three to four years after meeting at "AA." Appellant approached him one evening looking for help and desiring a sponsor. Crow helped Appellant through a six-month period of sobriety before Appellant relapsed. (R.XLVII,180-190).

Jerry Wood was employed with the Kaufman County Sheriff's Department and arrested Appellant on May 13, 1999. He had been dispatched to the Faith Baptist Church regarding an attempted suicide. Appellant advised Wood that he had wanted to kill himself, and threatened that once he got out of jail he would kill himself at that time. (R.XLVII,197-200).

Gary Kines was also a cousin of Appellant's father. He learned about Appellant being charged in this offense when he was summoned as a potential juror for Appellant's capital murder trial. He previously had known Appellant's father and had known him to have a drinking problem. He had known Appellant's father to become intoxicated and get into fights. (R.XLVII,202-205).

Tonya Thorp was Appellant's sister. She recalled from early childhood that the family background was not good. She had a poor relationship with Appellant's father because of the way their father treated Appellant's mother. She recalled instances where Appellant's father badly beat their mother, including an incident in which he smashed her head against the wall. On another occasion, the father knocked their mother's teeth out. Ultimately, the abuse led to the family splitting apart. The children for awhile went to live with grandparents, but ultimately ended up at Buckner Orphanage. Their mother returned for some of the children, but left Appellant and his brother at the orphanage to be adopted by others. Years later, she renewed her relationship with Appellant. In fact, Appellant came to live with her for a short period when he was having problems with his wife, Chelsea. Appellant assisted his sister by watching her children when she worked late and preparing meals for the family. (R.XLVII,206-220). After Appellant was arrested in connection with this offense, she returned to her house and found a suicide note written by Appellant, which she turned over to Detective Matt Myers with the Garland Police Department. Additionally, in her garage she found hoses, such as her vacuum cleaner attachment hose and other hoses

which were unusual. She also noticed that the liquor in her house was missing. (R.XLVII,222-224).

Hope Abbott was Appellant's mother. Her husband was Donny Kines, and the two were married until Kines' death, although they separated two to three years before Kines' death. She recalled her marriage to Kines as "very brutal." In fact, at the time of trial, Hope had no teeth as a result of the abuse from her husband. He was physically abusive not only towards her but towards the children, including Appellant. After leaving the marriage, she took two jobs and would work from 6:30 in the morning until 11:15 at night. Ultimately, she suffered a stroke and was unable to care for her children any longer. Although she reclaimed some of her children later, she left Appellant and his brother behind for adoption. Appellant and his mother, Hope Abbott, ultimately were reunited when Appellant was approximately 18 years old. Appellant told his mother about serious problems he had as teenager, including problems with the law and a suicide attempt. After reuniting with his mother, he continued to have problems, including further suicide attempts and criminal issues. Abbott continued to suffer health problems which included congestive heart failure disease which was ongoing even to the time of trial. (R.XLVII,226-239). The Appellant was twenty-six years old at the time of trial. (R.XLVII,243).

Mary Connell was a Doctor of Psychology. She performed an evaluation on Appellant with regard to the mitigation special issue. She reviewed the offense, Appellant's background, his medical records and school records. Additionally, she met with Appellant on three occasions for purposes of interviewing and testing. Results indicated that Appellant

was truthful in answering the questions rather than exaggerating responses for purposes of manipulation. Testing revealed “very disturbed functioning” such that would normally result in a referral for psychiatric consultation and medication. (R.XLVIII,10-19). She also investigated Appellant’s background, which included the abuse by his father against his mother, as well as the emotional abuse to Appellant. (R.XLVIII,20-21). She reviewed how when Appellant was five, his mother placed him along with his siblings at Buckner Children’s Home where Appellant remained while Appellant’s other siblings were later reclaimed by their mother. Appellant and his brother, Donny, were later adopted by the Tolar family, when Appellant was approximately eight years old. (R.XLVIII,23-26). Interviews of Mrs. Tolar indicated that the boys believed that they were placed with the Tolars because “their mama didn’t love them, didn’t want them.” (R.XLVIII,28-29). All the information was that Appellant was an “extremely cooperative child.” He was doing his best in the adoption situation and trying to adjust to the Tolar home. His brother Donny reported extreme physical abuse by Mr. Tolar directed at him and Appellant. In visiting with Celeste Tolar, she was able to obtain numerous photographs of Appellant as a child, most of which indicated that Appellant was not smiling, even around significant holidays, including his own birthday. Ultimately, the Tolars turned the children over to the Van Zandt County Children’s Shelter when Appellant was 12 years old. (R.XLVIII,34). Later, Appellant was adopted by the Murphy family and was separated from his brother, Donny. Appellant reported that he was placed with the Murphys at age 12, and began drinking and using drugs at age 14. Ultimately, the Murphys divorced and Appellant blamed himself. Appellant lived with Mr.

Murphy after the split causing his adopted mother to sever her relationship with Appellant. (R.XLVIII,36-37).

Connell interviewed Appellant's adopted brother, Matthew Murphy, who also reported that the parents engaged in physical fights in which Mr. Murphy would assault Mrs. Murphy. On one occasion, Matthew, in protecting his mother, struck his father in the face with his fist. Matthew reported that Appellant observed these instances of physical abuse between the Murphy parents. Appellant described to Dr. Connell his relationship with Chelsea, whom he met in grade school. He described their relationship as volatile and blamed himself and his alcohol abuse for the instances of confrontation between he and Chelsea. Chelsea reported that she herself participated, and in many instances, was the cause of some of the confrontation between she and Appellant. Chelsea also reported suicide attempts made by Appellant, although she did not characterize any of the attempts as "serious attempts." (R.XLVIII,45-47). Chelsea also reported that when Appellant was sober he took good care of their child and Appellant assisted her in caring for the child she had with another man. (R.LVIII,47-48). At approximately age nineteen, Appellant made a suicide attempt by taking approximately 40-to-60 pills which resulted in psychiatric treatment. Later, he was treated at Glen Oaks in Greenville twice for psychiatric disorders and was also treated at the Andrews Center in Canton, Texas, again for emotional difficulties. (R.LVIII,48-49). Appellant was also treated at Timberlawn Hospital for psychiatric disorders on two different occasions, and was prescribed several different psychotropic medications, mostly for depression and psychosis. Upon interviewing Appellant about the offense and reviewing the

police reports, Connell learned that Appellant had acknowledged killing the Complainant. His plan was to take his own life, and therefore he made no attempt to cover the use of the Complainant's credit cards, and signed his own name to the charges that he made. (R.LVIII,54).

Jaye Crowder was a psychiatrist on the faculty of Southwestern Medical School in Dallas. He examined Appellant on four different occasions and reviewed numerous records, investigative reports and medical records from Appellant spanning several years. He also interviewed several individuals associated with Appellant and the case. Dr. Crowder diagnosed Appellant with having major depression and dysthymic disorder, which means chronic depression spanning an extensive amount of time. Appellant also suffered from narcissistic and borderline personality disorder with some antisocial features. Crowder attributed depression to numerous factors, including a family history making Appellant genetically predisposed to suffering from depression. In addition, his early childhood experiences and loss of parental figures likely contributed to his later development of depression. Crowder attributed Appellant's general sense of worthlessness to having been abandoned and having been moved from one home to the next, never forming a lasting relationship with a father-figure, and not learning to trust. Medical records indicated suicide attempts by Appellant, and hallucinations in which he was seeing snakes attacking him. (R.LVIII,132-157).

Gilda Kessner was a clinical and forensic psychologist in private practice in Dallas. Based upon a risk assessment done of Appellant, she concluded that he posed a 23.8 to

29.1% probability of risk of serious violence over the course of a capital life term in prison. (R.LIX,4-11). Determination that Appellant's risk of 23.8 to 29.1 overall risk rate for lifetime was based upon the nature of his offense as well as his prior confinement in a TDC boot camp. (R.LVIII,49). The method applied was a scientific method much like the type of method used in assessing risk used by insurance companies. She examined studies of inmates confined in penal institutions for extended periods of time, including the "Furman" study, which examined 47 death-row inmates whose sentences had been changed to life sentences. Studies of those long-term death-row inmates indicated that only a small number of those individuals had any serious rule violations, and 75% of them did not have any serious rule violations over a ten- to eleven-year period of time after their sentence was commuted. (R.LVIII,19-24). Another study from Indiana looked at capital offenders with commuted sentences since 1972, which constituted 39 inmates. Seventy-four percent had no violent violations, and 62% were never put in any type of administrated segregation due to conduct. (R.LVIII,25). Another study looked at 90 Texas inmates on death-row whose sentences had been commuted, in comparison to rule violations across several high-security facility units in Texas. Comparison of offenders serving life sentences as opposed to those who had a death sentence commuted to life indicated that commuted death-row offenders had the lowest rate of rules violations. (R.LVIII,25-27). Other studies indicated that severity of the offense was not a good predictor in determining conduct in prison, nor is prior criminal history an accurate predictor of misconduct within prison systems. (R.LVIII,35-36). The essential conclusion was that commuted capital offenders had a very low rate of serious violent

infractions. The seriousness of the offense for which they are confined did not predict prison violence, and Texas prisoners in general have a low-rate of serious violence towards inmates and staff. In fact, rates of inmate and staff homicides in prison are significantly lower than the general population outside prison. Almost half of the long-term inmates in Texas were murderers. However, disciplinary rates were lower for long-term inmates than short-term inmates regardless of age at admission into the prison system. Additionally, as inmates aged, rule violations significantly dropped. So, the vast majority of violent offenders placed in long-term prison settings do not constitute a future danger within the prison system. (R.LVIII,43-44).

Detective Matt Meyers interviewed Appellant in the Garland jail and on at least two occasions, Appellant began crying during the interviews. Meyers believed that Appellant was remorseful. (R.XLVIII,103-104). Additionally, Appellant quickly admitted his responsibility for the disappearance and death of the Complainant. (R.XLVIII,104-105). Meyers also related how police officers composed a fictitious letter from family of the Complainant, signed by a person who purported to be the Complainant's sister. In the letter, the "family" asked that Appellant relate information to them in order to ease their mind and help them have closure with regard to the death of their family member. Meyers admitted that the letter was completely fictitious and used to trick Appellant into responding to specific questions about the offense. (R.XLVIII,107-110). Appellant voluntarily waived his rights and answered the questions in the "family" letter.

Tracy Erwin was one of Appellant's adopted sisters and resided with the Murphy family. She first came to know Appellant when he was 12 years old. (R.XLVIII,134-135). She confirmed that Appellant's adopted father, Bob Murphy, was abusive towards the mother. The father was also physically aggressive with the children and was generally "hard on them." (R.XLVIII,135-136). She believed that Appellant and his brother each went to live with one of the respective parents upon divorce out of an effort by the father to insure that no child support would be ordered. (R.XLVIII,135-137).

Tim Erwin was married to Tracy and came to know Appellant many years ago. In fact, he coached Appellant in Little League sports, and had been with him on camping and fishing trips. Erwin employed Appellant in his lawn care business. Appellant was approximately 11 or 12 years old when Erwin first came to know him, and he knew him to be "generally a good kid." (R.XLVIII,139-140).

State's rebuttal

In 1983, **Terry Tolar** and his wife adopted Appellant and his brother. He believed that Appellant adjusted well to the home and that he treated Appellant and his brother like his own children. However, Appellant's brother, Donny, had significant behavioral problems consistent with his diagnosis of attention deficit disorder. (R.XLVIII,146-156). Eventually, the boys were placed in the county children's shelter because of the disruptive nature of Donny's activities. Appellant elected to go with his brother rather than stay in the Tolar home. Tolar admitted that there were occasions when Appellant was "disciplined physically

more than he should have been” while in the Tolar home. (R.XLVIII,158-160). However, Tolar denied any physical abuse towards Appellant. (R.XLVIII,160-162).

Nancy Sanders was a nurse employed in the Dallas County Jail. On the morning of April 6, 2001, she saw Appellant in the infirmary in the jail. Appellant was complaining that he had not been able to urinate for several days, and that he had been previously treated at Parkland Hospital for his condition. The nurse checked Appellant’s records and confirmed that he had not been treated at Parkland as he claimed, but had tried to seek treatment there in the past. Later the same day, she received information that Appellant had sought help, claiming he was ill and requesting an ambulance. When assistance arrived, Appellant was asked to step out of the cell area. Appellant began cursing. After his vital signs were checked, it appeared he was normal. (R.LIX,176-178). When Appellant was told he could not go to Parkland Hospital but would instead be returned to the jail, he became upset and combative with the officers. He kicked one individual and the officers had to wrestle him to the floor. (R.LIX,178-179).

Sheryl Bard knew Appellant from the welding business when Appellant was employed as a welder in the early 2000. On one occasion, she had a problem Appellant who had taken her “pallet, used for placing tools. When asked about taking her pallet, Appellant became confrontational with her and admitted taking her pallet. Later, while leaving her employment, Bard pulled out in her car in front of Appellant. The following day, Appellant threatened her with physical harm if she ever cut him off in traffic again. (R.LIX,189-194). When she reported the confrontation to her boss, Appellant later threatened that if she ever

created more problems for him, he would kill her. (R.LIX,195-196). Appellant again threatened her when he was fired from his job. (R.LIX,198).

Defense Rebuttal Evidence

Gilda Kessner testified further that she examined records from Van Zandt county jail which indicated that Appellant in fact had a urinary problem as early as 1995.

REPORTER'S RECORD

VOLUME 1 of 1 VOLUMES

TRIAL COURT CAUSE NO. F00-02424-NM

THE STATE OF TEXAS : IN THE DISTRICT COURT
VS. : DALLAS COUNTY, TEXAS
JEDIDIAH ISAAC MURPHY : 194TH JUDICIAL DISTRICT

SUPPLEMENTAL RECORD REQUESTED BY APPELLANT ATTORNEY

A P P E A R A N C E S:

HONORABLE BILL HILL, Criminal District Attorney
Crowley Criminal Courts Building
Dallas, Dallas County, Texas 75207
Phone: 214-653-3600

BY: MR. GREG DAVIS, A.D.A., SBOT # 05493550
MS. MARY MILLER, A.D.A., SBOT # 21453200
FOR THE STATE OF TEXAS;

MS. JANE LITTLE, Attorney at Law, SBOT # 12424210
MR. MICHAEL BYCK, Attorney at Law, SBOT # 03549500
MS. JENNIFER BALIDO, Attorney at Law, SBOT # 10474880
Dallas County Public Defender's Office
Phone: 214-653-9400
FOR THE DEFENDANT.

On the 5th day of June, 2001, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable F. Harold Entz, Jr.,
Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by machine shorthand, computer
assisted transcription.

DARLINE W. LABAR, OFFICIAL REPORTER

ORIGINAL

74145

FILED IN
COURT OF CRIMINAL APPEALS

JUN 24 2002

Troy C. Bennett, Jr., Clerk

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Alena Treat

(Copy Attached)

JUROR QUESTIONNAIREJuror No. 1167

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

Name: Treat Alena Rae
 Last First Middle Maiden (If Applicable)

Sex: F Birthdate: 02 05 1953
 Month Day Year

Age: 48

Race: W

Birthplace: Ft. Lewis (Tacoma Rural) WA
 City/Town State

Driver's License No. 17180225
 Social Security No. 431-03-4193
 Home Address: 914 Rock Canyon Dr. Duncenville 75137
 Number Street City/Town Zip

Home Number (972) 572-5040 Work Number (972) 749-2614

The individual in this case is accused of capital murder. If, and only if, the State proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ No

Please explain your answer Only in favor if the person committing

murder is a danger to society (will probably kill again),

+ he/she did not have any mitigating circumstance
that would indicate that there may have been a justifiable reason to

Which of the following statements best represents your feelings about the death penalty: (Circle) commit the crime

1. I believe that the death penalty should be imposed in all capital murder cases.
2. I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in opposition of the death penalty? It is apparent that

the person ^{does} will not have a propensity to do this again or
can be rehabilitated

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:

(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
3. I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☐ Yes ☒ No If yes, which ones? _____

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

CRIMINAL JUSTICE SYSTEM

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is the length of time it takes to go through the legal process.

The death penalty in Texas is the law, instituted ^{to meet} for specific criteria, and is intended to ^{help} protect the citizens of Texas ~~from~~

Police officers mainly serve to enforce the law and to protect citizens

The burden of proof in a criminal case is on the "shoulders" of the prosecution

The prison system in Texas is established to protect Texas citizens and to rehabilitate those who violate the law

Prosecutors serve to protect citizens from criminals and to bring violators of the law to justice

Criminal defense attorneys serve to protect ^{and defend} their clients and to ensure that everything possible is done to protect the rights of the clients and to "bring to light" (clarify) any circumstances (truths) that will help their clients.

What makes a person dangerous? A ^{proven} propensity to commit the crime (murder ^{in this case}) again, ~~a~~ such as that person would ^{most likely} be a danger to society

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☒ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☒ Uncertain ☒ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

The law in the State of Texas says: "Voluntary intoxication does not constitute a defense to the commission of crime". Do you agree with this law? ☒ Yes ☐ No

Please explain. The law is "the law" and exists to protect citizens. It is the individual citizen's duty to ensure that what he/she does does not interfere with the safety of others.

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. Sometimes ~~the~~ a murder has no witnesses. Eliminating this ^{statement} would ~~enable~~ "open up the door" to more capital murders.

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. It depends on the circumstances. It is possible that this would be the first murder & that this person would ^{be} likely to do it again. It is also possible that the opposite would be true.

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. I learned a lot today with the judge's explanation & am impressed with how ^{the application} ~~this penalty~~ of this penalty is specifically defined.

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 8

(I don't like it, but do not understand how it could be any ~~more~~ better. Protecting society is important.)

Rank the following objectives of punishment in order of their importance to you:

1 Rehabilitation 2 Deterrence 3 Punishment

In your opinion, what does the death penalty say about American Culture? Life 25
Serious about protecting our citizens

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? It's fair and should be
up to the individual involved.

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☐ Yes ☒ No. Please explain your answer. Everyone should be presumed
innocent until proven guilty, and should have every
means available to protect him/her.

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| Person Charged | Charge | Date Accused | Outcome of Charge |
|----------------|--------|--------------|-------------------|
| 1. _____ | | | |
| 2. _____ | | | |
| 3. _____ | | | |
| 4. _____ | | | |

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys?

☒ Yes ☐ No

If yes, please give the following details:

| Person Using Attorney | Attorney | Reason Attorney Used |
|----------------------------|---|--|
| 1. <u>Me (+ my family)</u> | <u>Col. (Retired) Myers</u> <u>Don't remember name</u> | <u>Lawsuit against a company whose</u> <u>driver caused an avoidable</u> <u>accident that killed my mother</u> <u>and almost killed my father</u> <u>(1974). Settled out of court.</u> |
| 2. _____ | | |
| 3. _____ | | |

Do you know anyone who has been in jail or prison, or is in jail or prison?

☐ Yes ☒ No

If yes, please give the following details:

| | <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|----|-----------------------|---------------|-----------------------|--------------------------|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☒ Yes ☐ No

If yes, please give details. Helped ^{improve membership in} establish a Hate Crimes Commission for

Dallas (made recommendations for individuals/organizations to be represented in order to ensure appropriate representation)

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☒ Yes ☐ No

If yes, please give details. Child support - in AR - to get ex husband to pay child support. Robbery - Had media equipment stolen from my home

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Case 3:10-cv-00163-N Document 42 Filed 05/05/16 Page 11 of 18
Have you or your spouse ever served on a grand jury? ☐ Yes ☒ No If yes, please give dates and circumstances surrounding your service on the grand jury. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☐ Yes ☒ No

If yes, please give the following details:

Type of case

Verdict

Punishment

Whether Jury or Judge Set Punishment

1. _____
2. _____
3. _____

If no verdict was reached, please explain why. _____

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information available and the new information might have caused you to return a different verdict? _____

Were you the foreperson on any of those juries? ☐ Yes ☐ No

MA

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
4. I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☐ Yes ☒ No

Please give details: _____

BIOGRAPHICAL INFORMATIONHow long have you lived in Dallas County? 5 1/2 yrs

What other cities have you lived in, and how many years did you live in each city?

Bedford (2 mos.), Richardson (4 mos.), Carbondale, KS (3 yrs.)
 Little Rock, AR (18 yrs.), N. Little Rock, AR (3 yrs.), Fayetteville, AR
 (5 yrs.), more (I'm an Army brat) in LA, CA, GA, OK, Germany

Employer: Dallas Public Schools (DISD)Occupation/Duties: SOL Net (Speakers of Other Languages Network) CoordinatorHow long employed there? 6 yrsWhat other jobs have you held? teacher, specialist, asst. coordinator,
computer operator, mortgage loan clerkMarital Status: (Check one) ☐ Widowed ☐ Married ☐ Separated ☒ Divorced ☐ Single ☒How long married? 16 yrs How many times married? 1List any last names you had from previous marriages, if applicable. BoydSpouse's Name: _____
 Last First Middle Maiden (If Applicable)Birthdate: _____
 Month Day Year

Spouse's Employer: _____

Occupation Duties: _____

BROTHERS AND SISTERS

| Full Name | Age | School or Occupation |
|-----------------------|-----|-----------------------------------|
| 1. Randall Erle Treat | 47 | Systems Analyst |
| 2. Anthony Neal Treat | 45 | IRS Agent |
| 3. Loree Louise Treat | 44 | on disability (former landscaper) |
| 4. Candice Ayn Murphy | 43 | housewife |
| 5. _____ | | |

| Full Name | Age | School or Occupation |
|---------------------------|-----|--|
| 1. Jeremiah Randolph Boyd | 23 | ① Sales Representative, Circuit City ② College student at U of AR in Little Rock |
| 2. | | |
| 3. | | |
| 4. | | |

PARENTS

| Full Name | Age | Occupation (Before Retirement) |
|----------------------|-----|--|
| 1. Ralph Aubon Treat | 69 | ① Lt. Col US Army ② Asst. Dean in Business Adm at Univ. of AR, Fayetteville, A |
| 2. | | |

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☐ Yes ☒ No
If yes, please give details. _____

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?

☒ Yes ☐ No

If yes, please give details. I decided to seek assistance in dealing
with memories & emotions from childhood abuse
abuse It was quite helpful.

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? Mental health professionals can
be of assistance to individuals

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?

MEQ plus - considering entering doctorate
program

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself N/A

Spouse _____

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

various, esp. Unitarian Universalist

How often do you attend? infrequently

Other than attendance, what other activities are you involved in at your church?

N/A - none

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☒ No If yes, please give details. _____

Were you raised in some other faith or denomination? ☒ Yes ☐ No

If so, which one? Methodist

Do you consider yourself politically liberal, conservative, or moderate? moderate

Do you consider yourself a Democrat, Republican, Independent, etc.? Democrat at present time, former independent

Are you registered to vote? ☒ Yes ☐ No

Would you consider yourself as a leader or a follower? leader

What are your hobbies, recreations or pastimes? gardening, reading, logic problems, movies (video), video conferencing (Internet)

What bumper stickers do you have on your vehicle? none

Have you had a special interest (personally or through the media) in any criminal case?
☒ Yes ☐ No If yes, what was the case and what conclusions, if any, did you reach?

That I didn't have enough information to make a judgment one way or the other

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

Jose Plata

Marta Luther King

Women:

Sen. Hillary Clinton
~~Ellen DeGeneres~~ Representative
~~Ann Richards~~ Harryette
Ehrhart

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

Jeffery Danner (sp?)

George W. Bush

Women:

Katherine Harris

Squeaky Fromme

Have you ever owned or fired a gun? ☒ Yes ☐ No Please explain the circumstances surrounding your answer. A friend let me shoot her gun on a firing range once. (I wasn't very good.)

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the dates: Entire Apr week of April 21 (presenting at a

Navajo Language Conference + providing technical assistance to the Utah (Navajo) component of my grant, - ~~have~~ be I can miss it, though, if required to do so.

Are you currently taking any medication? ☒ Yes ☐ No

If yes, please give details. expectorant + antihistamine - to help
eliminate cough from ^{bronchial} flu I had in Jan. (B)

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. Not unless I couldn't eat
(I'm hypoglycemic.) at least every 3-4 hrs.

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No


If yes, please give details. _____

Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☒ Yes ☐ No If yes, why? to have the
experience of being a juror, to think & weigh
facts, to analyze, etc.

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

I don't know any of them.

POSSIBLE STATES WITNESSES

Civilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kauffman County Sheriff

J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Gerald Smothers

(Copy Attached)

JUROR QUESTIONNAIRE**Juror No.** 2033

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

Name: Smothers Gerald ALAN
 Last First Middle Maiden (If Applicable)

Sex: M

Birthdate: 09 01 65
 Month Day Year

Age: 35Race: W

Birthplace: Whittier CA.
 City/Town State

Driver's License No. 01859260Social Security No. 459-416127

Home Address: 2200 W. Wrenway Dr. Mesquite 75181
 Number Street City/Town Zip

Home Number (972) 22-6000 Work Number (214) 688-7000

The individual in this case is accused of capital murder. If, and only if, the state proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ No

Please explain your answer. I feel if an individual takes another
humans life without the fear of his/her own life that
punishment should be available

Which of the following statements best represents your feelings about the death penalty: (Circle)

1. I believe that the death penalty should be imposed in all capital murder cases.
- ② I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in favor of the death penalty? THE Ultimate punishment
& prevention of further loss.

What is the best argument in opposition of the death penalty? _____

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:
(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
- ③. I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☐ Yes ☒ No If yes, which ones? _____

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

CRIMINAL JUSTICE SYSTEM

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is N/A

The death penalty in Texas is I feel the death of a child should be raised up instead of 6yrs & younger.

Police officers N/A

The burden of proof in a criminal case is N/A

The prison system in Texas is N/A

Prosecutors N/A

Criminal defense attorneys N/A

What makes a person dangerous? No respect for themselves.

Please state your personal belief regarding the following ten (10) statements: (Check one answer in each question)

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☒ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☒ Strongly Disagree

The law in the State of Texas says: "Voluntary intoxication does not constitute a defense to the

commission of crime". Do you agree with this law? ☐ Yes ☐ No

Please explain. N/A

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. If the case leaves me with the mindset of beyond a reasonable doubt.

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other

crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. Death is death regardless what type of past history the person has had.

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. I feel the death penalty ~~is~~ is watched very closely by the court system in Texas.

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 10

Rank the following objectives of punishment in order of their importance to you:

1 Rehabilitation 3 Deterrence 2 Punishment

the ~~as~~ results of your actions.

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? I feel it is just that.

Our constitutional privilege.

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☒ Yes ☐ No. Please explain your answer. If a person is found guilty
by his peers one appeal is appropriate. To much time
and money of the State is spent tied up in appeals.

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| | <u>Person Charged</u> | <u>Charge</u> | <u>Date Accused</u> | <u>Outcome of Charge</u> |
|----|-----------------------|---------------|---------------------|--------------------------|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☒ Yes ☐ No

If yes, please give the following details:

| | <u>Person Using Attorney</u> | <u>Attorney</u> | <u>Reason Attorney Used</u> |
|----|------------------------------|-----------------------------|-----------------------------|
| 1. | <u>Myself</u> | <u>?</u> | <u>Purchased Property</u> |
| 2. | | <u>ALAN Kaiker (friend)</u> | <u>Business Atty.</u> |
| 3. | | | |

☒ Yes ☐ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|--|---------------|-----------------------|--------------------------|
| 1. Several of the guys that work for me have | | | |
| 2. been in jail before. Most of them have been | | | |
| 3. for either traffic fines or drugs. | | | |
| 4. | | | |

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☐ Yes ☒ No
If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☒ Yes ☐ No

If yes, please give details. always interested in what is going on
in our city & state.

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Have you or your spouse ever served on a grand jury? ☐ Yes ☒ No If yes, please give dates and circumstances surrounding your service on the grand jury. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☒ Yes ☐ No If yes, please give the following details:

Type of case Verdict Punishment Whether Jury or Judge Set Punishment

1. Spouse Do not remember the info on the case.
2. _____
3. _____

If no verdict was reached, please explain why. _____

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information available and the new information might have caused you to return a different verdict? THE

Verdict has to come from the info that is provided.

Were you the foreperson on any of those juries? ☐ Yes ☐ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
- ② When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
4. I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☒ Yes ☐ No

Please give details: As an assignment when I was in
College.

How long have you lived in Dallas County? 35 yrs.

What other cities have you lived in, and how many years did you live in each city?

Lived in Tyler 2 yrs (College)

Employer: General Insulation

Occupation/Duties: BRANCH Manager

How long employed there? 3 mos.

What other jobs have you held? Branch Manager (Comfort Supply) 14 yrs.

Marital Status: (Check one) ☐ Widowed ☒ Married ☐ Separated ☐ Divorced ☐ Single

How long married? 10 yrs. How many times married? 1

List any last names you had from previous marriages, if applicable. _____

Spouse's Name: Smother's Jamie Lynn Clifton
Last First Middle Maiden (If Applicable)

Birthdate: 06 07 65
Month Day Year

Spouse's Employer: Presby. Dallas Hospital.

Occupation Duties: Secretary

BROTHERS AND SISTERS

Full Name Age School or Occupation

1. _____
2. _____
3. _____
4. _____
5. _____

CHILDREN INFORMATION

| <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|---------------------------|------------|-----------------------------|
| 1. Tyler Clifton Smothers | 8 | CASA View Baptist School |
| 2. _____ | _____ | _____ |
| 3. _____ | _____ | _____ |
| 4. _____ | _____ | _____ |

PARENTS

| <u>Full Name</u> | <u>Age</u> | <u>Occupation (Before Retirement)</u> |
|-------------------------|------------|---------------------------------------|
| 1. JACK Warren Smothers | N/A | Grocery Buss. |
| 2. KAREN Kay Smothers | 62 | Sales |

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☐ Yes ☒ No
If yes, please give details. _____

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?
☐ Yes ☒ No
If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? I feel that it is a profession that is
needed and there are good ones as well as bad ones
as with any other profession

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?
Associates in Applied Science

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself N/A

Spouse N/A

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

CASA View Baptist Church DALLAS

How often do you attend? Regular

Other than attendance, what other activities are you involved in at your church?

Royal Ambassadors & Property & transportation comm.

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☐ No If yes, please give details. _____

Were you raised in some other faith or denomination? ☐ Yes ☒ No

If so, which one? _____

Do you consider yourself politically liberal, conservative, or moderate? _____

Do you consider yourself a Democrat, Republican, Independent, etc.? Republican

Are you registered to vote? ☒ Yes ☐ No

Would you consider yourself as a leader or a follower? leader

What are your hobbies, recreations or pastimes? Sports & outdoors

What bumper stickers do you have on your vehicle? 0

Have you had a special interest (personally or through the media) in any criminal case?

☐ Yes ☒ No

If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

Women:

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

Women:

Have you ever owned or fired a gun? ☒ Yes ☐ No Please explain the circumstances surrounding your answer. Recreation

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the dates: _____

Are you currently taking any medication? ☐ Yes ☒ No

If yes, please give details. _____

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

If yes, please give details. _____

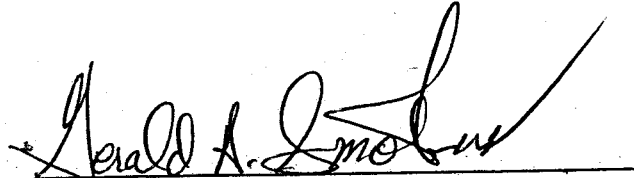
Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☒ Yes ☐ No If yes, why? I feel it

is our responsibility as a citizen to be there if
needed.

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATE'S WITNESSES

Civilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kaufman County Sheriff

J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Phillip May

(Copy Attached)

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

✓ 5/31

- ✓ 5/31

What is the best argument in favor of the death penalty? IT IS A ~~DETERENT~~ TO CRIME,

& IT IS A PROPER ^{TOOL} ~~PART~~ OF THE GOVT'S RESP TO MAINTAIN PEACE
& ORDER.

What is the best argument in opposition of the death penalty? MANY WOULD SAY

THAT THERE IS ^{NEVER A} REASON TO TAKE A PRISON LIFE. I BELIEVE
THAT DECISION REST IN THE RESP. OF GOVT.

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:

(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
- ③ I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☒ Yes ☐ No If yes, which ones? TREASON

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

CRIMINAL JUSTICE SYSTEM

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is THE SLOWNESS OF
THE PROCESS FOR ALL INVOLVED.

The death penalty in Texas is APPROPRIATE UNDER THE RIGHT CIRCUMSTANCES

Police officers ARE TO BE RESPECTED AND ARE AN IMPORTANT
PART OF OUR SOCIETY.

The burden of proof in a criminal case is ON THE PROSECUTING ATTORNEYS,

The prison system in Texas is - I DON'T HAVE AN ADEQUATE
KNOWLEDGE OF THE PRISON SYSTEM
TO COMMENT.

Prosecutors ARE AN INTEGRAL PART OF THE JUSTICE SYSTEM.

Criminal defense attorneys ARE NECESSARY TO INSURE AND ASSIST IN
A FAIR TRIAL FOR THE DEFENDANT
& IMPORTANT

What makes a person dangerous? I DON'T KNOW. IT IS HARD TO
THINK LIKE THAT. I SUPPOSE IT WOULD BE AN INABILITY
TO MAKE DECISIONS CONSISTENT WITH THE LAW. POSSIBLY THE
LACK OF CONCERN FOR THE SAFETY OF WELL BEING OF OTHERS. I DON'T KNOW.

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

The law in the State of Texas says: "Voluntary intoxication does not constitute a defense to the commission of crime". Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

I BELIEVE A PERSON IS RESPONSIBLE FOR THEIR ACTIONS. IF

THEY CHOOSE TO DRINK THEY HAVE RESP. FOR THEIR SUBSEQUENT
ACTIONS.

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

1) NOT ALL CRIMES HAVE WITNESSES 2) THE GATHERING OF EVIDENCE

IS PART OF THE METHODOLOGY OF OUR CRIMINAL SYSTEM TO AID THE
JURY IN THE DECISION MAKING PROCESS.

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. BASED ON THE EVIDENCE PRESENTED, THE JURY IS CHARGED

WITH THE DETERMINATION OF A DEFENDANT'S GUILT OR INNOCENCE AND TO
ASSESSMENT OF THE

WHAT EXTENT HE/SHE SHOULD BE PUNISHED. IT IS A RESP OF THE
GOVT WITH WHICH THEY ARE TEMPORARILY EMPOWERED.

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. I BELIEVE THE DEATH PENALTY SHOULD BE THE LAST RESORT

I BELIEVE THE DEATH PENALTY IS APPROPRIATE & SHOULD BE USED

BY THE STATE WHEN A CRIME WARRANTS IT.

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 7

Rank the following objectives of punishment in order of their importance to you:

1 Rehabilitation 2 Deterrence 3 Punishment

In your opinion, what does the death penalty say about American culture?

THAT OUR GOV'T HAS THE RESP TO MAINTAIN PEACE &
IS NOT AFRAID TO ENFORCE THAT RESP.

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege?

I AGREE W/ IT.

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☐ Yes ☒ No. Please explain your answer. I BELIEVE THEY SHOULD BE

AFFORDED DUE PROCESS.

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| | <u>Person Charged</u> | <u>Charge</u> | <u>Date Accused</u> | <u>Outcome of Charge</u> |
|----|-----------------------|---------------|---------------------|--------------------------|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☒ Yes ☐ No

If yes, please give the following details:

| | <u>Person Using Attorney</u> | <u>Attorney</u> | <u>Reason Attorney Used</u> |
|----|------------------------------|-----------------|-----------------------------|
| 1. | * BUSINESS ASSOCIATES | ? | RELATED BUSINESS LITIGATION |
| 2. | | | |
| 3. | | | |

* I DO FINANCIAL AUDIT WORK SO I REVIEW LEGAL DOCUMENTS & BILLS AS A MATTER OF COURSE.

Do you know anyone who has been in jail or prison, or is in jail or prison?

☒ Yes ☐ No

If yes, please give the following details:

| | <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|----|-----------------------|---------------|-----------------------|--------------------------|
| 1. | CLAYTON JENKINS | DRUGS | ? | STILL ON PROBATION |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☐ Yes ☒ No
If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☒ Yes ☐ No

If yes, please give details. ON TRIAL (WIFE)

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☐ Yes ☒ No

If yes, please give the following details:

Type of case

Verdict

Punishment

Whether Jury or Judge Set Punishment

1. _____
2. _____
3. _____

If no verdict was reached, please explain why. _____

N/A

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

N/A

How would you feel if you later learned that you, as a juror, did not have all of the information available and the new information might have caused you to return a different verdict? _____

I BELIEVE IT WOULD BE THE JUSTICE SYSTEM'S RESP TO
TO
RECESS OUR DECISION & MAKE THE APPROPRIATE SUBSEQUENT DETERMINATION.

Were you the foreperson on any of those juries? ☐ Yes ☒ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
- ④ I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☒ Yes ☐ No

Please give details: VARIOUS MOCK TRIALS - VIEWING MEDIA

BIOGRAPHICAL INFORMATIONHow long have you lived in Dallas County? 49 YEARS

What other cities have you lived in, and how many years did you live in each city?

AUSTIN - 1 YEAREmployer: SELF - EMPLOYEDOccupation/Duties: CPAHow long employed there? 12 or 13 YEARSWhat other jobs have you held? PART TIME CHURCH STAFF (MUSIC MINISTER)Marital Status: (Check one) ☐ Widowed ☒ Married ☐ Separated ☐ Divorced ☐ SingleHow long married? 29 YEARS IN JULY How many times married? 1

List any last names you had from previous marriages, if applicable. _____

Spouse's Name: MAY BETTY JAYNE (TURN)
Last First Middle Maiden (If Applicable)Birthdate: 2 22 53
Month Day YearSpouse's Employer: N/A

Occupation Duties: _____

BROTHERS AND SISTERS

| | <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----|------------------------|------------|-----------------------------|
| 1. | <u>HENRY G MAY III</u> | <u>51</u> | <u>TILE WORK</u> |
| 2. | <u>MARTIN B MAY</u> | <u>45</u> | <u>COMPOSERS</u> |
| 3. | <u>CLINTON MAY</u> | <u>43</u> | <u>CHURCH STAFF</u> |
| 4. | <u>JANE MAY</u> | <u>41</u> | <u>HUMAN SERVICES</u> |
| 5. | _____ | _____ | _____ |

| <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----------------------|------------|-----------------------------------|
| 1. APRIL DAWN MAY | 27 | PERSONNEL TRAINING |
| 2. PHILLIP C. MAY II | 26 | COMP-(CITY OF DALLAS) SECURITY |
| 3. PETER TURN MAY | 18 * | HOME SCHOoled |
| 4. AMBER JAYNE MAY | 16 | / |
| BRYAN ALYSE MAY | 9 | |

PARENTS

| <u>Full Name</u> | <u>Age</u> | <u>Occupation (Before Retirement)</u> |
|---------------------|------------|---------------------------------------|
| 1. KERRY G. MAY JR. | 81 | TRAILER REPAIR |
| 2. JERRY O MAY | 76 | N/A |

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☒ Yes ☐ No
If yes, please give details. 6 HOURS IN COLLEGE

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?
☐ Yes ☒ No
If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? _____
MIXED - I FEEL THEY DO SERVE A PURPOSE, BUT THEY
ARE ONLY ONE OF A NUMBER OF ALTERNATIVES

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?
BBA - BUSINESS ADMINISTRATION

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself

U/A

Spouse

X**RELIGIOUS, POLITICAL AND OTHER ACTIVITIES**

Name and location of your church, synagogue or place of worship

STADY GOSPEL CHURCH - GRAND PRAIRIE

How often do you attend? WEEKLY

Other than attendance, what other activities are you involved in at your church?

NONE

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☐ No If yes, please give details. I DON'T KNOW.

Were you raised in some other faith or denomination? ☒ Yes ☐ No

If so, which one? BAPTIST

Do you consider yourself politically liberal, conservative, or moderate? CONSERVATIVE

Do you consider yourself a Democrat, Republican, Independent, etc.? NONE - THOUGH MY

LEANING IS REPUBLICAN

Are you registered to vote? ☒ Yes ☐ No

Would you consider yourself as a leader or a follower? LEADER

What are your hobbies, recreations or pastimes? HOMESCHOOLING ACTIVITIES

What bumper stickers do you have on your vehicle? NONE

☐ Yes ☒ No If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

BILL GOTHARD

GEORGE BUSH

Women:

PHYLLIS SCHAFLEY (?)

SHARLEN DOBSON

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

BILL CLINTON

SUDAN HUSSAIN (?)

Women:

DEME MOORE

?

Have you ever owned or fired a gun? ☒ Yes ☐ No Please explain the circumstances surrounding your answer. I HAVE A SHOTGUN. I HAVE SHOT SKEET.

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the

dates: WASH DC 3/28 - 4/1/

Are you currently taking any medication? ☐ Yes ☒ No

If yes, please give details. _____

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

If yes, please give details. _____

Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

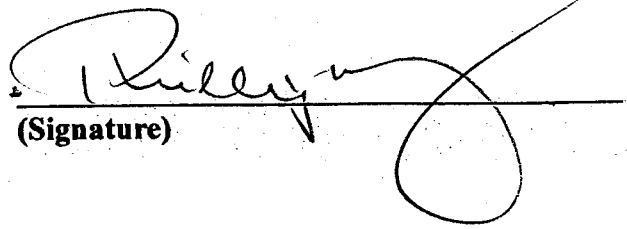
IT IS A VERY SUPERIOR THOUGHT.

Do you want to serve as a juror in this case? ☐ Yes ☐ No If yes, why? _____

I WILL DO IT. I AM SOBERED BY THE

PROSPECT.

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATE'S WITNESSES

Civilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - John Robuck

(Copy Attached)

Juror No. 1958

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

Name: ROBUCK JOHN HARBIN
Last First Middle Maiden (If Applicable)

Sex: M

Age: 28

Race: C

Birthdate: 09 06 72
Month Day Year

Birthplace: DALLAS TX
City/Town State

Driver's License No. _____
Social Security No. 444-19-1111
Home Address: 12345 DAVENPORT DALLAS TX 75214
Number Street City/Town Zip

Home Number (214) 826-7135 Work Number (214) 989-1629

The individual in this case is accused of capital murder. If, and only if, the State proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ No

Please explain your answer.

It is the only way to reconstitute the murder of an innocent individual

Which of the following statements best represents your feelings about the death penalty: (Circle)

1. I believe that the death penalty should be imposed in all capital murder cases.
2. I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in favor of the death penalty? Eye for an eye

What is the best argument in opposition of the death penalty? Wrong verdict

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:
(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
3. I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☐ Yes ☒ No If yes, which ones? _____

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☒ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

CRIMINAL JUSTICE SYSTEM

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is the lack amount of
time it takes to process a criminal case

The death penalty in Texas is constitutional

Police officers do a good job

The burden of proof in a criminal case is in the hands of the prosecuting
attorneys

The prison system in Texas is not underfunded

Prosecutors do their job

Criminal defense attorneys have biases toward their client

What makes a person dangerous? Intent to do harm

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

The law in the State of Texas says: "Voluntary intoxication does not constitute a defense to the commission of crime". Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

You are still responsible for your actions

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

I believe that the DA's office is not going to bring someone to trial they think is innocent especially w/ the use of medical advances.

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

Again, you are responsible for your own actions regardless of your past history

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. _____

Through the court systems, and medical advances w/ DNA, I believe it is fair

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 9

Rank the following objectives of punishment in order of their importance to you:

3 Rehabilitation

2 Deterrence

1 Punishment

In your opinion, what does the death penalty say about American Culture? That we

are going to punish people who do wrong.

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? I disagree. I think it is

the responsibility of the accused to defend themselves through testimony

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☒ Yes ☒ No. Please explain your answer. I think a fair trial by jury is fair.

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

Person Charged

Charge

Date Accused Outcome of Charge

1. _____
2. _____
3. _____
4. _____

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☐ Yes ☒ No

If yes, please give the following details:

Person Using Attorney

Attorney

Reason Attorney Used

1. _____
2. _____
3. _____

Do you know anyone who has been in jail or prison, or is in jail or prison?

☐ Yes ☒ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|-----------------------|---------------|-----------------------|--------------------------|
| 1. _____ | | | |
| 2. _____ | | | |
| 3. _____ | | | |
| 4. _____ | | | |

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☒ Yes ☐ No

If yes, please give details. _____

my wife works w/ Child Protective Services through counseling

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☒ Yes ☐ No

If yes, please give details. *Been a victim of burglary*

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☒ Yes ☐ No If yes, please give the following details:

| Type of case | Verdict | Punishment | Whether Jury or Judge Set Punishment |
|----------------------------------|---------|------------|--------------------------------------|
| 1. DWI - 3 rd Offense | HUNG | — | — |
| 2. _____ | _____ | _____ | _____ |
| 3. _____ | _____ | _____ | _____ |

If no verdict was reached, please explain why. 11 of the 12 jurors felt
the accused was guilty - One did not.

Did you feel you had all the information you needed to reach a verdict? ☒ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information
available and the new information might have caused you to return a different verdict? _____

Bring the case to appeals court

Were you the foreperson on any of those juries? ☐ Yes ☒ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
4. I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☐ Yes ☒ No
Please give details: _____

How long have you lived in Dallas County? My whole life

What other cities have you lived in, and how many years did you live in each city?

Employer: Dain Rauscher Inc

Occupation/Duties: Business Analyst

How long employed there? One Year

What other jobs have you held? Bank One - Investments

Marital Status: (Check one) ☐ Widowed ☒ Married ☐ Separated ☐ Divorced ☐ Single

How long married? 1 year How many times married? 1

List any last names you had from previous marriages, if applicable.

Spouse's Name: Robuck Carmina James James
Last First Middle Maiden (If Applicable)

Birthdate: 09 04 72
Month Day Year

Spouse's Employer: Park Cities Baptist Church / Promise House

Occupation Duties: Counselor

BROTHERS AND SISTERS

| | <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----|---------------------------|------------|-----------------------------|
| 1. | <u>Richard May Robuck</u> | <u>26</u> | <u>Rice Graduate School</u> |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

CHILDREN INFORMATIONFull NameAgeSchool or Occupation

1. _____
2. _____
3. _____
4. _____

PARENTSFull NameAgeOccupation (Before Retirement)

1. JOEL ROBUCK 60 REAL ESTATE
2. LINDA REBUCK 53 HOUSEWIFE

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☒ Yes ☐ No

If yes, please give details. _____

Wife studied psychology in Grad School

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?

☐ Yes ☒ No

If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? _____

They are a good source of healing

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?

Graduated College

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself _____

Spouse _____

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

Park Cities Baptist Church

How often do you attend? WEEKLY

Other than attendance, what other activities are you involved in at your church?

Wednesday Night Programs / Saturday Night Services

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☐ No If yes, please give details. _____

UNKNOWN

Were you raised in some other faith or denomination? ☒ Yes ☐ No

If so, which one? PRESBYTERIAN

Do you consider yourself politically liberal, conservative, or moderate? CONSERVATIVE MODERATE

Do you consider yourself a Democrat, Republican, Independent, etc.? REPUBLICAN

Are you registered to vote? ☒ Yes ☐ No

Would you consider yourself as a leader or a follower? LEADER

What are your hobbies, recreations or pastimes? _____

GOLF TENNIS

What bumper stickers do you have on your vehicle? College Sticker

~~COLLEGE~~ ~~IMBIBER~~

Have you had a special interest (personally or through the media) in any criminal case?
☐ Yes ☒ No If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

GEORGE BUSH

REN KIRK

Women:

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

BILL CLINTON

Women:

HILARY CLINTON

Have you ever owned or fired a gun? ☐ Yes ☒ No Please explain the circumstances surrounding your answer.

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the

dates: YES - MARCH 22-26 / APRIL 27-29

JULY 15-31

Are you currently taking any medication? ☐ Yes ☒ No

If yes, please give details. _____

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

If yes, please give details. _____

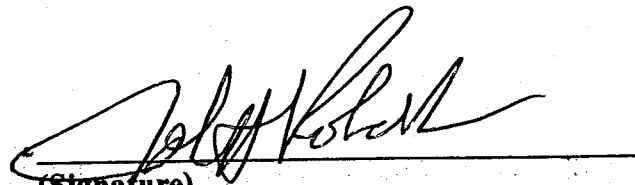
Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☒ Yes ☒ No If yes, why? _____

It's my duty as a U.S. Citizen

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATES WITNESSES

Civilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kaufman County Sheriff

J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Thomas Brooks

(Copy Attached)

JUROR QUESTIONNAIREJuror No. 77

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

Name: BROOKS THOMAS A
 Last First Middle Maiden (If Applicable)

Sex: M

Birthdate: 11 26 43 6/11
 Month Day Year

Age: 57Race: C

Birthplace: DEXALB TX
 City/Town State

Driver's License No. 02776573Social Security No. 456-74-4144

Home Address: 2602 AMY
 Number Street

ROWLETT
 City/Town

75088-5875
 Zip

Home Number (972) 475-7019 Work Number (214) 827-0813 EXT 7177

The individual in this case is accused of capital murder. If, and only if, the State proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ No

Please explain your answer. I FEEL IT IS A NECESSARY TOOL IN OUR JUSTICE

SYSTEM

Which of the following statements best represents your feelings about the death penalty: (Circle)

1. I believe that the death penalty should be imposed in all capital murder cases.
- (2.) I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in favor of the death penalty? PROVE CRIME WITHOUT AID

DOUBT

What is the best argument in opposition of the death penalty? REASONABLE DOUBT

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:
(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
3. I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☐ Yes ☒ No If yes, which ones? _____

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

CRIMINAL JUSTICE SYSTEM

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is _____

The death penalty in Texas is NECESSARY

Police officers NEED MORE QUALIFIED OFFICERS

The burden of proof in a criminal case is EVIDENCE PRESENTED IN THE CASE

The prison system in Texas is OVER CROWDED

Prosecutors _____

Criminal defense attorneys _____

What makes a person dangerous? ABILITY TO CONTINUE CRIMINAL ACTS

"I trust the criminal justice system in Dallas County."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

The law in the State of Texas says "Voluntary intoxication does not constitute a defense to the commission of crime". Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. _____

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. _____

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 10

Rank the following objectives of punishment in order of their importance to you:

2 Rehabilitation

1 Deterrence

3 Punishment

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? I agree

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☐ Yes ☒ No. Please explain your answer. _____

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Date Accused</u> | <u>Outcome of Charge</u> |
|-----------------------|---------------|---------------------|--------------------------|
|-----------------------|---------------|---------------------|--------------------------|

1. _____
2. _____
3. _____
4. _____

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☐ Yes ☒ No

If yes, please give the following details:

| <u>Person Using Attorney</u> | <u>Attorney</u> | <u>Reason Attorney Used</u> |
|------------------------------|-----------------|-----------------------------|
|------------------------------|-----------------|-----------------------------|

1. _____
2. _____
3. _____

Do you know anyone who has been in jail or prison, or is in jail or prison?

☐ Yes ☒ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|-----------------------|---------------|-----------------------|--------------------------|
|-----------------------|---------------|-----------------------|--------------------------|

1. _____
2. _____
3. _____
4. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☐ Yes ☒ No

If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Have you or your spouse ever served on a grand jury? ☐ Yes ☒ No If yes, please give dates and circumstances surrounding your service on the grand jury. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☐ Yes ☒ No If yes, please give the following details:

| Type of case | Verdict | Punishment | Whether Jury or Judge Set Punishment |
|--------------|---------|------------|--------------------------------------|
|--------------|---------|------------|--------------------------------------|

1. _____

2. _____

3. _____

If no verdict was reached, please explain why. _____

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information available and the new information might have caused you to return a different verdict? _____

Were you the foreperson on any of those juries? ☐ Yes ☐ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
4. I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☐ Yes ☐ No
Please give details: _____

How long have you lived in Dallas County? 33 yrs

What other cities have you lived in, and how many years did you live in each city?

DEKALB, TX (18) vs DETROIT, MI (64)

Employer: JULIETTE FOWLER HOMES INC

Occupation/Duties: MAINTENANCE

How long employed there? 4

What other jobs have you held? Repton Credit Mgt, Accounting Clerk

Marital Status: (Check one) ☐ Widowed ☒ Married ☐ Separated ☐ Divorced ☐ Single

How long married? 33 yr How many times married? 1

List any last names you had from previous marriages, if applicable.

Spouse's Name: BROOKS LINDA JOYCE SANDERS
Last First Middle Maiden (If Applicable)

Birthdate: 4 19 40
Month Day Year

Spouse's Employer: JULETTE FOWLER HOMES, INC

Occupation Duties: SECRETARY

BROTHERS AND SISTERS

Full Name

Age

School or Occupation

1. CHARLES WILLIAM BROOKS ~~#2~~ MECHANIC
2. DAVID LYNN BROOKS DOZER OPERATOR
3. ALICE MARIE ROBERTS HOUSE WIFE
4. _____
5. _____

CHILDREN INFORMATIONFull NameAgeSchool or Occupation

1. MISTY MAE HANERSON Bornett High Bank
2. WENDY LORRAINE NEIGORS BOOK KEEPER
3. _____
4. _____

PARENTSFull NameAgeOccupation (Before Retirement)

1. JOHN WILLIAM BROOKS MECHANIC
2. MARY BROOKS HOUSE WIFE

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☐ Yes ☒ No

If yes, please give details. _____

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?

☐ Yes ☒ No

If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? THEY ARE A NEEDED PROFESSION

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?

12TH

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself Army - 2 yrs

Spouse _____

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

SPRING HILL BAPTIST

How often do you attend? NOT Regular

Other than attendance, what other activities are you involved in at your church?

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☐ No If yes, please give details. _____

Were you raised in some other faith or denomination? ☐ Yes ☒ No

If so, which one? _____

Do you consider yourself politically liberal, conservative, or moderate? CONSERVATIVE

Do you consider yourself a Democrat, Republican, Independent, etc.? DEMOCRAT

Are you registered to vote? ☐ Yes ☒ No

Would you consider yourself as a leader or a follower? LEADER

What are your hobbies, recreations or pastimes? FISHING, SPORTS

What bumper stickers do you have on your vehicle? NONE

Have you had a special interest (personally or through the media) in any criminal case?

☐ Yes ☒ No If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:
Men: Women:

List two (2) men and women who are publicly known whom you **LEAST** respect:
Men: Women:

Have you ever owned or fired a gun? ☒ Yes ☐ No Please explain the circumstances surrounding your answer. HUNTING

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?
☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?
☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?
☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the dates: _____

Are you currently taking any medication? ☒ Yes ☐ No

If yes, please give details. LIPITOR - (Cholesterol)

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

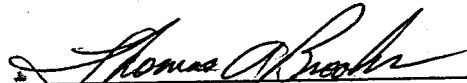
If yes, please give details. _____

Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☒ Yes ☐ No If yes, why? _____

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATES WITNESSESCivilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbal
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kaufman County Sheriff

J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Kimberly Edge

(Copy Attached)

JUROR QUESTIONNAIRE

Juror No. 403

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

Name: Edge Kimberly Sue Wright
Last First Middle Maiden (If Applicable)

Sex: F Birthdate: September 01 1969
Age: 31 Month Day Year

Race: W Birthplace: Springfield Ohio
City/Town State

Driver's License No. 02860700
 Social Security No. 219-86-3655
 Home Address: 1117 West Park Drive Garland 75040
Number Street City/Town Zip

Home Number (972) 530-3186 Work Number (214) 840-6792

The individual in this case is accused of capital murder. If, and only if, the State proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ No

Please explain your answer. A person should be responsible for
their actions and suffer consequences depending
on severity of the case.

Which of the following statements best represents your feelings about the death penalty: (Circle)

1. I believe that the death penalty should be imposed in all capital murder cases.
- ② I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in opposition of the death penalty? Mentally ill

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:
(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
- ③. I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☐ Yes ☒ No If yes, which ones? _____

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is too many people are
given short sentences for crimes committed.

The death penalty in Texas is being used fairly.

Police officers serve our community & should be
respected.

The burden of proof in a criminal case is that people could view
evidence differently.

The prison system in Texas is fair

Prosecutors would like to see the defendant
prosecuted.

Criminal defense attorneys defend their clients

What makes a person dangerous? Temper, mentality, offenses,

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☐ Agree ☒ Uncertain ☐ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☒ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☐ Agree ☒ Uncertain ☐ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☒ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☒ Agree ☒ Uncertain ☐ Disagree ☐ Strongly Disagree

commission of crime". Do you agree with this law? ☒ Yes ☐ No

Please explain. A person needs to be accountable for
their actions.

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. If there is enough evidence presented, there
should not ~~be~~ need to be an eyewitness

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. Just because a person hasn't previously
committed a crime, doesn't mean that they should
not be punished for the crime they did committ.

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. I feel that the death penalties given
have fit the crime committed.

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief?
(1 being the least and 10 being the strongest) 10

Rank the following objectives of punishment in order of their importance to you:

2 Rehabilitation 3 Deterrence 1 Punishment

In your opinion, what does the death penalty say about American culture? The state
will not tolerate murders.

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? I feel it is fair.

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☐ Yes ☒ No. Please explain your answer. Even criminals have to
have rights

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| | <u>Person Charged</u> | <u>Charge</u> | <u>Date Accused</u> | <u>Outcome of Charge</u> |
|----|-----------------------|---------------|---------------------|--------------------------|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☒ Yes ☐ No

If yes, please give the following details:

| | <u>Person Using Attorney</u> | <u>Attorney</u> | <u>Reason Attorney Used</u> |
|----|------------------------------|-------------------|-----------------------------|
| 1. | | Marialyne Barnard | worked for her |
| 2. | | Betsy Whitaker | acquaintance |
| 3. | | | |

Do you know anyone who has been in jail or prison, or is in jail or prison?

☒ Yes ☐ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Jail or Prison</u> | <u>Outcome of Charge</u> |
|-----------------------|---------------|-----------------------|--------------------------|
| 1. Jodie Clifford | Felony | Prison | Released. |
| 2. _____ | | | |
| 3. _____ | | | |
| 4. _____ | | | |

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☐ Yes ☒ No
If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☐ Yes ☒ No

If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☐ Yes ☒ No

If yes, please give details. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☐ Yes ☒ No

If yes, please give the following details:

Type of case

Verdict

Punishment

Whether Jury or Judge Set Punishment

1. _____

2. _____

3. _____

If no verdict was reached, please explain why. _____

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information
available and the new information might have caused you to return a different verdict? _____

Were you the foreperson on any of those juries? ☐ Yes ☐ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
4. I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☐ Yes ☐ No
Please give details: _____

BIOGRAPHICAL INFORMATIONHow long have you lived in Dallas County? 12

What other cities have you lived in, and how many years did you live in each city?

Springfield, Ohio - 18 years

Employer:

KPMG LLPOccupation/Duties: Admin assistant, assist partners & personnelHow long employed there? 2 yearsWhat other jobs have you held? Secretarial, food serviceMarital Status: (Check one) ☐ Widowed ☒ Married ☐ Separated ☐ Divorced ☐ SingleHow long married? 11 years How many times married? 1

List any last names you had from previous marriages, if applicable. _____

Spouse's Name:

Edge
LastDoyle
FirstWayne
Middle

Maiden (If Applicable)

Birthdate:

01
Month17
Day1966
Year

Spouse's Employer:

Prestige Ford

Occupation Duties:

Parts Salesman**BROTHERS AND SISTERS**Full NameAgeSchool or Occupation1. Donald Eugene Wright32weber

2. _____

3. _____

4. _____

5. _____

CHILDREN INFORMATION

| | <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----|-----------------------|------------|-----------------------------|
| 1. | Christopher Ryan Edge | 9 | Spring Creek Elem. |
| 2. | | | |
| 3. | | | |
| 4. | | | |

PARENTS

| | <u>Full Name</u> | <u>Age</u> | <u>Occupation (Before Retirement)</u> |
|----|---------------------------|------------|---------------------------------------|
| 1. | Donald Eugene Wright, Sr. | 60 | inspector |
| 2. | Stella June Wright | 51 | housewife |

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☐ Yes ☒ No
 If yes, please give details. _____

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?
☐ Yes ☒ No
 If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? Positive

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?

12

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself NA

Spouse Marines - ?

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

NA

How often do you attend? NA

Other than attendance, what other activities are you involved in at your church?

NA

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☐ No If yes, please give details. NA

Were you raised in some other faith or denomination? ☐ Yes ☐ No

If so, which one? NA

Do you consider yourself politically liberal, conservative, or moderate? Moderate

Do you consider yourself a Democrat, Republican, Independent, etc.? Independent

Are you registered to vote? ☐ Yes ☒ No

Would you consider yourself as a leader or a follower? leader

What are your hobbies, recreations or pastimes? bowling, skating,

What bumper stickers do you have on your vehicle? None

Have you had a special interest (personally or through the media) in any criminal case?
☐ Yes ☒ No If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

George Bush

Women:

Susan B. Anthony

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

NA

Women:

NA

Have you ever owned or fired a gun? ☐ Yes ☒ No Please explain the circumstances surrounding your answer.

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the dates: NA

Are you currently taking any medication? ☐ Yes ☒ No

If yes, please give details. _____

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

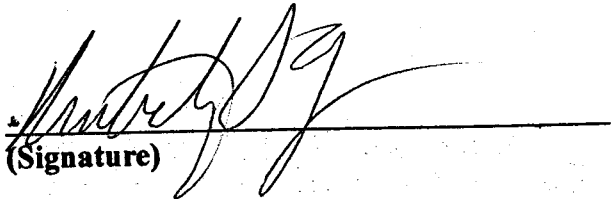
If yes, please give details. _____

Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☐ Yes ☒ No If yes, why? _____

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."


(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATES WITNESSESCivilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold,*M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kauffman County Sheriff
J. Wood

H. Tim

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COURT'S RECORD

JUROR QUESTIONNAIRE

Venireperson - Kimberly Williams

(Copy Attached)

05/401 1PM

JUROR QUESTIONNAIRE

Juror No. 278

You have taken an oath to truthfully answer the following questions. Please answer each and every question as completely and accurately as you can. The information you give in this questionnaire will be kept confidential. After a jury has been selected, all copies of this questionnaire will be returned to the Court, and kept in confidence, under seal, not accessible to the public or the media.

6/1 notified
Lalia Williams
co-worker

Name: Williams Kimberly Renee
Last First Middle Maiden (If Applicable)

Sex: FBirthdate: 06 12 64Age: 36

Month Day Year

Race: BBirthplace: Dallas TX
City/Town StateDriver's License No. 126778470Social Security No. 463-33-8808Home Address: 4445 Saddle Road DeSoto 75115

Number Street

City/Town

Zip

Home Number

(972) 223-2489

Work Number

(972) 572-4262

The individual in this case is accused of capital murder. If, and only if, the State proves its case beyond a reasonable doubt as to the defendant, the jury will decide punishment. There is no way of knowing whether the jury will even find the defendant guilty, but the law requires that you answer certain questions regarding your thoughts and feelings on the death penalty.

DEATH PENALTY

Are you in favor of the death penalty? ☒ Yes ☐ NoPlease explain your answer: Dependent on the evidence of the case.

37

Which of the following statements best represents your feelings about the death penalty: (Circle)

1. I believe that the death penalty should be imposed in all capital murder cases.
- ②. I believe that the death penalty is appropriate in some capital murder cases and I could return a verdict resulting in death in a proper case.
3. Although I do not believe that the death penalty should ever be imposed, as long as the law provides for it, I could assess it under the proper set of circumstances.
4. I believe that the death penalty is appropriate in some capital murder cases, but I could never return a verdict which assessed the death penalty.
5. I could never, under any circumstances, return a verdict which assessed the death penalty.

What is the best argument in opposition of the death penalty? all evidence not favorable

LIFE CONFINEMENT IN PRISON

Which of the following statements best represents your feelings about life confinement in prison:
(Circle)

1. I believe that life confinement in prison is never appropriate in any capital murder case.
2. I believe that life confinement in prison is never appropriate in any murder case.
- ③ I believe that life confinement in prison is appropriate in some capital murder cases and I could return a verdict resulting in life confinement in a proper case.

Do you think that the death penalty should be available for punishment upon conviction of other criminal offenses? ☒ Yes ☐ No If yes, which ones? aggravated offense

Do you have any moral, religious or personal beliefs that would prevent you from sitting in judgment of another human being? ☐ Yes ☒ No

Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being? ☐ Yes ☒ No

Have you received any information regarding this case from any source outside of this courtroom, including, but not limited to, any newspaper articles, television news, internet site, or any other hearsay source? ☐ Yes ☒ No Please list the source and the substance of the information _____

Have you discussed any aspect of this case with anyone? ☐ Yes ☒ No

From hearsay, or otherwise, have you established in your mind such a conclusion as to the guilt or innocence of the Defendant as would influence you in finding a verdict? ☐ Yes ☒ No

Please complete the following eight (8) statements:

The biggest problem in the criminal justice system is _____

The death penalty in Texas is reasonable

Police officers are citizens ~~as well~~ head to protect & serve

The burden of proof in a criminal case is determined by ~~prosecuting~~ ^{prosecuting} attorneys

The prison system in Texas is okay

Prosecutors need to prove there case

Criminal defense attorneys need to prove there case

What makes a person dangerous? Having the intent to hurt or harm another human.

"I trust the criminal justice system in Dallas County."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Criminal laws (including sentences and punishment) treat criminal defendants too harshly."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If someone is accused of Capital Murder, he should have to prove his innocence."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"Persons determine their destiny or fate by choices they make in life."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"A person's destiny or fate is determined by the circumstances of their birth and their upbringing as well as the choices that they make in life."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"Genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"If a person is brought to trial on murder charges, that person is probably guilty."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

"A defendant is innocent unless proven guilty beyond a reasonable doubt."

☐ Strongly Agree ☒ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

"It is the job of the jury to solve the crime."

☐ Strongly Agree ☐ Agree ☐ Uncertain ☒ Disagree ☐ Strongly Disagree

The law in the State of Texas says "Voluntary intoxication does not constitute a defense to the commission of crime". Do you agree with this law? ☐ Yes ☒ No

Please explain. If you volunteer to drink and you are involved in a accident and you hurt someone it is a crime.

The law in the State of Texas says that a person can be convicted of capital murder based solely on circumstantial evidence with no eyewitnesses if you believe the evidence beyond a reasonable doubt.

Do you agree with this law? ☒ Yes ☐ No

Please explain. If all evidence is there

The law in the State of Texas says that a person convicted of capital murder can receive the death penalty solely because of the facts and circumstances of the crime, even if he has committed no other crimes. Do you agree with this law? ☒ Yes ☐ No

Please explain. They can receive it if the jury agrees.

Do you believe the death penalty is applied fairly in the State of Texas? ☒ Yes ☐ No

Please explain. Based on all evidence of the State it is

fair

Have you ever felt differently about the death penalty than you do now? ☐ Yes ☒ No

If yes, please explain what brought about this change and when the change occurred.

If you believe in using the death penalty, how strongly, on a scale of 1 to 10, do you hold that belief? (1 being the least and 10 being the strongest) 10

Rank the following objectives of punishment in order of their importance to you:

3 Rehabilitation

2 Deterrence

1 Punishment

In your opinion, what does the death penalty say about American culture? in it

The Constitution says an accused citizen does not have to testify on his or her own behalf. How do you feel about this constitutional privilege? It's okay that's why they have a lawyer

Do you think citizens accused of criminal offenses are afforded too many rights by the Constitutions of the United States and the State of Texas and the criminal laws of this state?

☒ Yes ☐ No. Please explain your answer. They have a right to a fair trial.

Have you, your spouse, any family members or close personal friends ever been accused, arrested or convicted (including probation, deferred adjudication, conditional discharge, fine, etc.) of a crime

ABOVE the level of a traffic ticket? ☐ Yes ☒ No

If yes, please give the following details:

| <u>Person Charged</u> | <u>Charge</u> | <u>Date Accused</u> | <u>Outcome of Charge</u> |
|-----------------------|---------------|---------------------|--------------------------|
| 1. _____ | | | |
| 2. _____ | | | |
| 3. _____ | | | |
| 4. _____ | | | |

Have you, your spouse, any family members or close personal friends ever used the services of an attorney, been involved in litigation, or had friends or associates (professionally or socially) who are attorneys? ☒ Yes ☐ No

If yes, please give the following details:

| <u>Person Using Attorney</u> | <u>Attorney</u> | <u>Reason Attorney Used</u> |
|------------------------------------|-----------------|-----------------------------|
| 1. <u>Self - Kimberly Williams</u> | <u>Brunson</u> | <u>malpractice</u> |
| 2. _____ | | |
| 3. _____ | | |

Do you know anyone who has been in jail or prison, or is in jail or prison?

Case 3:10-cv-00163-N Document 42 Filed 05/05/10 Page 421 of 748 PageID 974

☐ Yes ☒ No

If yes, please give the following details:

Person Charged

Charge

Jail or Prison

Outcome of Charge

1. _____
2. _____
3. _____
4. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national group opposed to the death penalty or any group dedicated to defendants' rights? ☐ Yes ☒ No If yes, please give details. _____

Have you, your spouse or any close family member ever been associated with, or worked with any state, local or national citizen law enforcement group such as a crime commission, group dedicated to victims' rights, traffic commission, neighborhood crime watch, Mothers Against Drunk Driving or police or sheriff's auxiliary? ☒ Yes ☐ No

If yes, please give details. I worked for Dallas County Sheriffs Dept
from 1986 to 1991.

Have you, your spouse, any family members or close personal friends ever been the victim of a crime, a witness to a crime or been interested in the outcome of a criminal case (either personally or through the media)? Have you ever used the services of this or any other District Attorney's office (hot checks, child support, protective order, etc.)?

☐ Yes ☒ No

If yes, please give details. _____

Have you, your spouse, any family members or close personal friends ever had any training in law enforcement, applied for employment in law enforcement or been employed in law enforcement (police officer, constable, deputy sheriff, security guard, prison or detention officer, parole officer, probation officer, secretary in police department, etc.)? ☒ Yes ☐ No

If yes, please give details. I was a detention officer from 1986 to 1991

Have you or your spouse ever served on a grand jury? ☐ Yes ☒ No If yes, please give dates and circumstances surrounding your service on the grand jury. _____

Have you or your spouse ever been a juror in a civil or criminal case?

☐ Yes ☒ No If yes, please give the following details:

Type of case Verdict Punishment Whether Jury or Judge Set Punishment

1. _____
2. _____
3. _____

If no verdict was reached, please explain why. _____

Did you feel you had all the information you needed to reach a verdict? ☐ Yes ☐ No

How would you feel if you later learned that you, as a juror, did not have all of the information available and the new information might have caused you to return a different verdict? _____

Were you the foreperson on any of those juries? ☐ Yes ☒ No

Regarding your jury service: (circle the number(s) which apply to you):

1. I can tell pretty easily when a person is telling a lie.
2. When I make up my mind, I rarely change it.
3. I can frequently be influenced by the opinion of others.
- ④ I always follow my own ideas rather than do what others expect of me.

Outside of your jury service, have you ever observed a court proceeding before? ☒ Yes ☐ No

Please give details: I was in a proceeding of malpractice.

How long have you lived in Dallas County? 36 years

What other cities have you lived in, and how many years did you live in each city?

Dallas - 28 yrs De Soto - 8 yrs

Employer: Inspiring Body of Christ Children's College

Occupation/Duties: Teacher

How long employed there? 1 year

What other jobs have you held? Detention Officer, Retail, Cashier

Marital Status: (Check one) ☐ Widowed ☐ Married ☐ Separated ☐ Divorced ☒ Single

How long married? N/A How many times married?

List any last names you had from previous marriages, if applicable. N/A

Spouse's Name: N/A
 Last First Middle Maiden (If Applicable)

Birthdate:
 Month Day Year

Spouse's Employer: N/A

Occupation Duties: N/A

BROTHERS AND SISTERS

| <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----------------------------------|------------|--|
| 1. <u>Mary Barzile</u> | <u>41</u> | <u>Criminal Investigation Specialist</u> |
| 2. <u>Carlos Vernon Williams</u> | <u>38</u> | <u>Postal service</u> |
| 3. <u>Anthony Wayne Williams</u> | <u>37</u> | <u>Police officer</u> |
| 4. <u></u> | <u></u> | <u></u> |
| 5. <u></u> | <u></u> | <u></u> |

CHILDREN INFORMATION

| | <u>Full Name</u> | <u>Age</u> | <u>School or Occupation</u> |
|----|--------------------------|------------|-----------------------------|
| 1. | Mychal Anthony Williams | 12 | Trinity Christian School |
| 2. | Mycha'la Antone Williams | 5 | TRBC Childrens College |
| 3. | | | |
| 4. | | | |

PARENTS

| | <u>Full Name</u> | <u>Age</u> | <u>Occupation (Before Retirement)</u> |
|----|-------------------|------------|---------------------------------------|
| 1. | Rosemary Williams | 58 | Crime Prevention Specialist |
| 2. | Johnny Williams | 60 | Coke Cola |

Have you, any family member or close personal friend ever studied psychology, sociology, criminology or law (or worked for a person in one of these fields)? ☐ Yes ☒ No

If yes, please give details. _____

Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?

☐ Yes ☒ No

If yes, please give details. _____

What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals? all health professionals are okay if

they job and also recommend spiritual guidance

EDUCATION

What is the highest grade level that you have completed in school, including trade or technical schools?

12th grade

MILITARY SERVICE

Please list branch, years of service, duties (including duty as military police and service on any court martial, including the nature of the charges), rank, type of discharge and whether you served in combat :

Yourself N/A

Spouse N/A

RELIGIOUS, POLITICAL AND OTHER ACTIVITIES

Name and location of your church, synagogue or place of worship

Inspiring Body of Christ Church 7710 S. Inland

How often do you attend? 3x a week

Other than attendance, what other activities are you involved in at your church?

Choir and I work there.

Does your church, synagogue or place of worship have a position on the death penalty?

☐ Yes ☒ No If yes, please give details.

Were you raised in some other faith or denomination? ☒ Yes ☐ No

If so, which one? Baptist

Do you consider yourself politically liberal, conservative, or moderate? Conservative

Do you consider yourself a Democrat, Republican, Independent, etc.? Dem

Are you registered to vote? ☒ Yes ☐ No

Would you consider yourself as a leader or a follower? leader

What are your hobbies, recreations or pastimes? Doing hair, typing, enjoying

outdoors

What bumper stickers do you have on your vehicle? None

Have you had a special interest (personally or through the media) in any criminal case?

☐ Yes ☒ No

If yes, what was the case and what conclusions, if any, did you reach?

List two (2) men and women who are publicly known whom you **MOST** respect:

Men:

Women:

List two (2) men and women who are publicly known whom you **LEAST** respect:

Men:

Women:

Have you ever owned or fired a gun? ☐ Yes ☒ No Please explain the circumstances surrounding your answer.

THIS CASE

Do you know either of the prosecutors, Greg Davis and Mary Miller? ☐ Yes ☒ No

Do you know any of the defense attorneys, Mike Byck, Jane Little and Jennifer Balido?

☐ Yes ☒ No

Do you know, or think you might know, the defendant, Jedidiah Isaac Murphy, or any of his family?

☐ Yes ☒ No

Did you know the deceased, Bertie Cunningham, or any of her family? ☐ Yes ☒ No

Do you know Bill Hill, Dallas County District Attorney, or any other members of his staff?

☐ Yes ☒ No

If you have any plans to be out of Dallas County within the next six (6) months, please state the dates: _____

Are you currently taking any medication? ☐ Yes ☒ No

If yes, please give details. _____

Do you have any personal or health problems (hearing, medications, etc.) that would prevent you from giving your full attention to the testimony during the trial? ☐ Yes ☒ No

If yes, please give details. _____

Do you know of any reason why you could not sit as a juror for this trial, be absolutely fair to the Defendant and the State and render a verdict based solely upon the evidence presented to you?

☐ Yes ☒ No

If yes, please give details. _____

Is there any reason why you would not want to serve as a juror in this case? ☐ Yes ☒ No

If yes, please give details. _____

Do you want to serve as a juror in this case? ☒ Yes ☐ No If yes, why? Because I

have never been a juror in any case.

"I DECLARE UNDER PENALTY OF PERJURY THAT ALL OF MY ANSWERS IN THIS JUROR QUESTIONNAIRE ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE."

Kimberly P. Williams
(Signature)

Please review the attached list of names, and circle the names you know, or might know.

POSSIBLE STATE'S WITNESSESCivilians

Elizabeth Chaney Erwin
 Debbie Armstrong
 Treshod Tarrant
 Gary Oats
 Clint Wiggington
 Brandon Zachery
 Michael Wayne Williams
 Mark Read
 Brian Lane
 Kenneth Crisler
 Leslie Webster
 Joseph Testa
 Ray Bob Phillips
 Chelsea Willis
 Jeanne Evans
 Sherryl Wilhelm
 Leslie Dunkin
 Dana Jones
 Marjorie Ellis
 Felix Ozuna
 Evelyn Shelton
 Jerry Conner
 Francis Conner
 Erika Erwin
 Tonya Thorp
 Zachary Mamot
 Ryan Hammonds
 Ashleigh Johnson
 Bobby Harp
 Phillip Shaun Cruz
 Jennie Duval, M.D.
 Tim Erwin
 Kenneth Clance
 Whalen Brunton
 Jennifer Farnsworth
 Cassye Erwin
 Samantha Murphy
 Charles Armitage
 Brent Simmons
 Logan Craft
 Bob Murphy
 Doha Aridi
 Akram Aridi
 Matt Tollesbol
 Jerry Kwiechen
 Jatora Yarborough
 Ora Mae Milton

Civilians

Randy Crow
 Christy Baugh
 Derek Cruz
 Lesa Flowers
 Willard Gold, M.D.
 Rathidevi Reddy, M.D.
 Luke Peris, M.D.
 Jeffrey DeHaan, M.D.
 John Motley
 Cindy Monds
 William Vandiver, M.D.
 James Garrison, M.D.
 Stephen Farnes, M.D.
 Shirley Bard
 Terry Tolar
 Celeste Tolar
 Kenneth Fritcher
 Steve Gipson
 Joanna Gilmore
 Kirsten Adames
 Hooman Sedighi, M.D.
 Kenneth Pruitt
 Jan Brooks
 William Estabrook, M.D.
 Julie Gaynor
 Mark Landrum
 Kenneth Phillips
 Richard Shollenberger
 Jack Shellnut
 George Poteet
 Monty Dunn
 Cesar De La Torre
 Harlan Bailey
 David Davenport
 Robert Rabbel
 Bud Farmer
 Alan Cousins
 Ozell Wilcoxson
 Diana Langford
 K. Pruitt
 Stephen Vestal
 Jan Brooks
 Debra Murphy
 John Donahue
 Patricio Mamot
 Sandra Mamot
 Randy Hammond

Garland Police Dept

M. J. Meyers
 J. S. Rogers
 J. Mowery
 J. L. Lay
 J. Delmar
 W. Brown
 S. Tooke
 V. Long
 B. Rice
 P. Parker
 V. Standley
 H. Tharp

Terrell Police Dept

D. Alberty

Van Zandt County Sheriff

G. Rose
 J. Branch
 R. Goodson
 R. Goldey
 R. Pool
 J. DeCoux
 D. Pool
 D. Blaylock
 K. Jackson

Edgewood Police Dept

J. Bonham
 D. Corbett
 M. Bates

Arlington Police Dept

D. Neese
 J. Stanton

Wills Point Police Dept

James Lee
 I. Medina
 R. Keeney

Dallas Police Dept

W. Clifton
 M. Poole
 C. Garcia
 B. Bedford

Kaufman County Sheriff

J. Wood

H. Tim

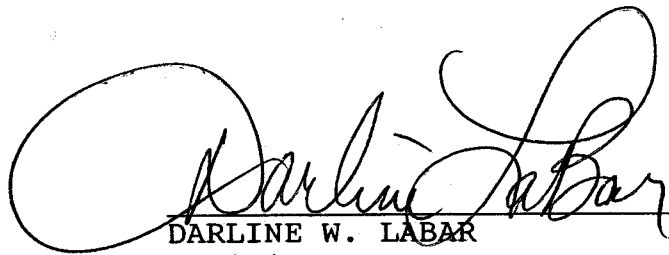
TRIAL COURT CAUSE NO. F00-02424-NM

THE STATE OF TEXAS : IN THE 194TH DISTRICT
VS. : COURT OF DALLAS COUNTY
JEDIDIAH ISAAC MURPHY : T E X A S

I, Darline W. LaBar, Official Court Reporter of the
194th Judicial District Court, in and for Dallas County,
Texas do hereby certify that the foregoing exhibits
constitutes true and complete duplicates of the original
exhibits, excluding physical evidence, offered into evidence
during the Trial on the Merits in the above-entitled and
numbered cause as set out herein before the Honorable F.
Harold Entz, Jr., Judge of the 194th District Court of Dallas
County, Texas, and a jury trial, beginning the 30th day of
May, A.D., 2000.

I further certify that the total cost for the
preparation of this Reporter's Record is \$38.25 and will be
paid by Dallas County.

Witness my hand this the 17th day of June, A.D.,
2002.



DARLINE W. LABAR
Official Court Reporter
194th Judicial District Court
Dallas County, Texas
(214) 653-5803

Certification No. 1064 Expires December 31, 2002

DARLINE W. LABAR, OFFICIAL REPORTER

7/1/45

FORM 355A

JEDIDIAH ISAAC MURPHY

CAUSE NO. F00-02424-NM

VS:

IN THE 194TH JUDICIAL DISTRICT

THE STATE OF TEXAS

COURT OF DALLAS COUNTY, TEXAS

=====

= MASTER =

= INDEX =

CAPTION

VOL. 1-01

TRUE BILL OF INDICTMENT (00 DEC 7)

VOL. 1-02

TRIAL DOCKET

VOL. 1-04

WRIT FOR SPECIAL VENIRE (15 DEC 00)

VOL. 1-08

WRIT OF SPECIAL VENIRE (3 JAN 01)

VOL. 1-09

LETTER FROM DLS CTY SHERIFF'S DEPT REGARDING
MAILING JURY SUMMONS (FEB 14 01)

VOL. 1-10

JACKSON V. DENNO MOTION FOR HEARING ON
VOLUNTARINESS OR ANY ADMISSION OR CONFESSION
WHETHER WRITTEN OR ORAL (01 MAY 31)

VOL. 1-11

STATE'S DISCOVERY MOTION (00 DEC 19)

VOL. 1-13

MOTION FOR DISCOVERY OF SPECIFIC ITEMS
(01 MAR 12)

VOL. 1-15

SECOND SPECIFIC MOTION FOR DISCOVERY (MAY 22 01)

VOL. 1-19

STATE'S RESPONSE TO DEFENDANT'S SECOND SPECIFIC
MOTION FOR DISCOVERY (MAY 29 01)

VOL. 1-24

THIRD MOTION FOR DISCOVERY OF SPECIFIC ITEMS
(CANNOT READ FILE DATE)

VOL. 1-33

STATE'S RESPONSE TO DEFENDANT'S THIRD MOTION
FOR DISCOVERY OF SPECIFIC ITEMS (MAY 25 01)

VOL. 1-36

DEFENDANT'S FOURTH MOTION FOR DISCOVERY
(JUNE 4 01)-ORDER

VOL. 1-38

DEFENDANT'S FIFTH MOTION FOR DISCOVERY (2001 JUN 27)

VOL. 1-41

SPECIFIC MOTION PURSUANT TO BRADY V. MARYLAND
(01 MAY 22)

VOL. 1-43

STATE'S RESPONSE TO DEFENDANT'S SPECIFIC MOTION
PURSUANT TO BRADY V. MARYLAND (MAY 20 01)

VOL. 1-53

DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS
OFFENSES REASONABLY CONTEMPLATED BY THE
PROSECUTION TO BE INTRODUCED AT TRIAL
(31 MAY 01)

VOL. 1-62

NOTICE OF INTENT TO USE EXTRANEIOUS
UNADJUDICATED OFFENSES (00 DEC 19)

VOL. 1-67

FILED IN
COURT OF CRIMINAL APPEALS

NOV 05 2001

Troy C. Bennett, Jr., Clerk

FORM 355A

= CONTINUED =

PAGE 2

| | | |
|----|--|------------|
| 1 | SUPPLEMENTAL NOTICE OF INTENT TO USE | |
| 2 | EXTRANEIOUS AND UNADJUDICATED OFFENSES (01 APR 12) | VOL. 1-71 |
| 3 | SUPPLEMENTAL NOTICE OF INTENT TO USE EXTRANEIOUS | |
| 4 | AND UNADJUDICATED OFFENSES (01 MAY 9) | VOL. 1-74 |
| 5 | NOTICE OF INTENT TO USE CERTIFIED RECORDS | |
| 6 | (00 DEC 19) | VOL. 1-76 |
| 7 | MOTION TO DISCLOSE PLEA BARGAINS, DEALS AND/OR | |
| 8 | GRANTS OF IMMUNITY (01 MAY 31) | VOL. 1-78 |
| 9 | MOTION FOR DISCOVERY OF CERTAIN INFORMATION | |
| 10 | REGARDING POTENTIAL WITNESSES FOR THE STATE | |
| 11 | PURSUANT TO BRADY V. MARLAND TEXAS CODE OF | |
| 12 | CRIM PROCEDURE (01 MAR 1) | VOL. 1-80 |
| 13 | MOTION TO DISCLOSE EXPERT WITNESSES AND OPINIONS | |
| 14 | (00 DEC 19) | VOL. 1-83 |
| 15 | DISCLOSURE OF EXPERT WITNESSES (01 FEB 21) | VOL. 1-85 |
| 16 | DISCLOSURE OF EXPERT WITNESSES (MAY 25 01) | VOL. 1-87 |
| 17 | STATE'S MOTION TO TAKE DEFENSE EXPERT ON | |
| 18 | VOIR DIRE (01 MAR 1) | VOL. 1-90 |
| 19 | STATE'S MOTION TO AUTHORIZE DISCLOSURE OF | |
| 20 | PATIENT INFORMATION (00 DEC 12) | VOL. 1-92 |
| 21 | MOTION REQUESTING NOTICE OF DEFENDANT'S | |
| 22 | INTENT TO INTRODUCE FUTURE DANGEROUSNESS EXPERT | |
| 23 | TESTIMONY (00 DEC 19) | VOL. 1-95 |
| 24 | STATE'S SUPPLEMENTAL LIST OF POSSIBLE WITNESSES | |
| 25 | (MAY 29 01) | VOL. 1-97 |
| 26 | ORDER ALLOWING DEFENDANT'S CRIME SCENE EXPERT | |
| 27 | ACCESS TO VICTIM'S CAR (01 MAY 17) | VOL. 1-99 |
| 28 | STATE'S MOTION IN LIMINE (01 MAR 1) | VOL. 1-100 |
| 29 | STATE'S MOTION IN LIMINE REGARDING MITIGATION | |
| 30 | EVIDENCE (01 MAR 1) | VOL. 1-103 |
| 31 | MOTION IN LIMINE REGARDING PHOTOGRAPHS (JUN 4 01) | VOL. 1-105 |
| 32 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN | |
| 33 | LIMINE REGARDING PHOTOGRAPHS (01 MAR 1) | VOL. 1-107 |
| 34 | MOTION IN LIMINE REGARDING EXTRANEIOUS TRANS- | |
| 35 | ACTIONS (JUN 4 01) | VOL. 1-111 |
| 36 | MOTION IN LIMINE REGARDING ALLEGED EVIDENCE | |
| 37 | OF SEXUAL ASSAULT OF VICTIM (JUN 4 01) | VOL. 1-114 |
| 38 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN | |
| 39 | LIMINE REGARDING PUNISHMENT ARGUMENT (01 MAR 1) | VOL. 1-117 |
| 40 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE | |
| 41 | REGARDING VICTIM IMPACT-CHARACTER TESTIMONY | |
| 42 | (01 MAR 1) | VOL. 1-119 |

FORM 355A

= CONTINUED =

PAGE 3

| | | |
|----|---|-------------|
| 1 | STATE'S RESPONSE TO DEFENDANT'S MOTION TO | |
| 2 | VOIR DIRE ON CHARACTER; VICTIM IMPACT TESTIMONY | |
| | (01 MAR 1) | VOL. 1-122 |
| 3 | MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A | |
| 4 | WARRANT (01 MAY 31) | VOL. 1-125 |
| 5 | MOTION TO SUPPRESS STATEMENTS (01 MAY 31) | VOL. 1-127 |
| 6 | MOTION TO SUPPRESS ITEMS SEIZED FROM DEFENDANT'S | |
| 7 | CELL AT DALLAS COUNTY JAIL (01 JUN 6) | VOL. 1-130 |
| 8 | MOTION TO ALLOW QUESTIONING OF VENIRE REGARDING | |
| | SPECIFIC ISSUES IN THIS CASE (01 MAR 13) | VOL. 1-133 |
| 9 | STATE'S RESPONSE TO DEFENDANT'S MOTION REGARDING | |
| | PRIOR JURY SERVICE (01 MAR 1) | VOL. 1-137 |
| 10 | STATE'S RESPONSE TO DEFENDANT'S REQUEST TO | |
| 11 | UTILIZE PEREMPTORY CHALLENGES FOLLOWING | |
| | EXAMINATION OF THE ENTIRE VENIRE (01 MAR 1) | VOL. 1-139 |
| 12 | MOTION TO DENY TELEVISION CAMERAS FROM FILING | |
| 13 | ANY PART OF THE TRIAL (01 MAR 1) | VOL. 1-142 |
| 14 | ORDER CONCERNING MEDICAL EXPERTS AND EXAMINATIONS | |
| | (JUN 4 01) | VOL. 1-147 |
| 15 | MOTION FOR JURY INSTRUCTIONS REGARDING EVIDENCE | |
| 16 | INTRODUCED AT PUNISHMENT FOR CONSIDERATION OF | |
| | SPECIAL ISSUES (01 JUN 12) | VOL. 1-148 |
| 17 | MOTION FOR MISTRIAL PURSUANT TO THE DECISION | |
| 18 | OF THE UNITED STATES SUPREME COURT IN PENRY II | |
| | (01 JUN 5) | VOL. 1-152 |
| 19 | CHARGE OF THE COURT (GUILT/INNOCENCE) (JUN 11 01) | VOL. 1-169 |
| 20 | JURY VERDICT ON GUILT | VOL. 1-189 |
| 21 | NOTE FROM JURY TO COURT (01 JUN 30) | VOL. 1-190 |
| 22 | MOTION FOR MISTRIAL BASED ON UNCONSTITUTIONAL | |
| 23 | APPLICATION OF PROSECUTORIAL DISCRETION IN | |
| 24 | DEATH PENALTY CASES IN DALLAS COUNTY-EXHIBITS- | |
| | (01 JUN 26) | VOL. 1-191 |
| 25 | CHARGE OF THE COURT (PUNISHMENT) | VOL. 1-205 |
| 26 | JURY VERDICT ON GUILT | VOL. 1-214 |
| 27 | JUDGMENT/SENTENCE (06-30-01) | VOL. 1-215 |
| 28 | DEFENDANT'S MOTION FOR NEW TRIAL/ORDER | |
| 29 | (JUL 30 01) | VOL. 1-219 |
| 30 | DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH | |
| 31 | APPOINTMENT OF ATTORNEY ON APPEAL/ORDER | |
| | (JUN 30 01) | VOL. 1-220 |
| 32 | ORDER APPOINTING COUNSEL PURSUANT TO ARTICLE | |
| 33 | 11.071 C.C.P. (12 SEP 01) | VOL. 1-221C |

JRM 355A

= CONTINUED =

PAGE 4

| | | |
|---|--|------------|
| 1 | ORDER REMOVING COUNSEL (4 OCT 01) | VOL. 1-222 |
| 2 | ORDER APPOINTING COUNSEL PURSUANT TO ARTICLE 11.071 C.C.P. (4 OCT 01) | VOL. 1-223 |
| 3 | DEFENDANT'S REQUEST FOR CLERK'S AND COURT 4 REPORTER'S RECORD AND EXHIBITS ON APPEAL-ORDER (01 JUL 11) | VOL. 1-224 |
| 5 | REQUEST FOR COURT REPORTER' RECORD (01 JUL 11) | VOL. 1-231 |
| 6 | PEREMPTORY JURY CHALLENGE (DEFENSE) (01 MAY 31) | VOL. 1-232 |
| 7 | PEREMPTORY JURY CHALLENGE (STATE) (Q1 MAY 31) | VOL. 1-233 |
| 8 | CLERK'S CERTIFICATE THAT APPELLATE RECORD IS 9 TRUE AND CORRECT (10 25 01) | VOL. 1-234 |

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

FORM 355A

JEDIDIAH ISAAC MURPHY CAUSE NO. F00-02424-NM
 VS: IN THE 194TH JUDICIAL DISTRICT
 THE STATE OF TEXAS COURT OF DALLAS COUNTY, TEXAS

=====

= INDEX =

VOL. 2 OF 4: PAGES 235 THRO 460:

| | |
|---|------------|
| INDEX TO DEFENDANT'S PRETRIAL MOTIONS (FEB 27 01) | VOL. 2-235 |
| MOTION TO PRECLUDE PROSECUTION FROM SEEKING THE DEATH PENALTY (FEB 27 01)-ORDER | VOL. 2-239 |
| MOTION TO QUASH BASED ON UNCONSTITUTIONALITY OF TEX CAPITAL SENTENCING SCHEME-ORDER (FEB 27 01) | VOL. 2-246 |
| MOTION TO DECLARE JURY SELECTION PROCEDURE UNCONSTITUTIONAL-ORDER (FEB 27 01) | VOL. 2-257 |
| DEFENDANT'S OBJECTION TO PROPOSED PUNISHMENT CHARGE (FEB 27 01) | VOL. 2-260 |
| OMNIBUS PRETRIAL MOTION (FEB 27 01) | VOL. 2-272 |
| MOTION FOR DISCOVERY, PRODUCTION AND INSPECTION OF EVIDENCE (FEB 27 01) | VOL. 2-282 |
| SECOND MOTION FOR DISCOVERY AND INSPECTION OF EVIDENCE (FEB 27 01) | VOL. 2-297 |
| DEFENDANT'S REQUEST FOR NOTICE OF EXTRANEIOUS ACTS AND CHARACTER EVIDENCE (FEB 27 01) | VOL. 2-313 |
| MOTION FOR DISCOVERY RELATED TO DNA (FEB 27 01) | VOL. 2-314 |
| MOTION REQUESTING NOTICE OF STATE'S INTENT TO USE PRIOR CONVICITIONS FOR IMPEACHMENT (FEB 27 01) | VOL. 2-317 |
| MOTION FOR INVENTORY OF ITEMS TAKEN AT THE CRIME SCENES (FEB 27 01) | VOL. 2-319 |
| MOTION FOR DISCOVERY IN DEATH PENALTY CASE (FEB 27 2001) | VOL. 2-321 |
| DEFENDANT'S MOTION TO PREVENT UNFAIR SURPRISE DURING TRIAL (FEB 27 01)-ORDER | VOL. 2-330 |
| MOTION IN LIMINE REGARDING DNA EVIDENCE (FEB 27 01) | VOL. 2-334 |
| MOTION IN LIMINE REGARDING CHARACTER WITNESSES- ORDER (FEB 27 01) | VOL. 2-337 |
| MOTION IN LIMINE REGARDING PRIOR CONVICTIONS- ORDER (FEB 27 01) | VOL. 2-339 |
| MOTION IN LIMINE REGARDING STATEMENTS (FEB 27 01) | VOL. 2-341 |

FORM 355A

= CONTINUED =

PAGE 2

| | | |
|----|--|------------|
| 1 | MOTION IN LIMINE REGARDING PUNISHMENT ARGUMENT (FEB 27 01) | VOL. 2-343 |
| 2 | | |
| 3 | MOTION IN LIMINE REGARDING PHOTOGRAPHS (FEB 27 01) | VOL. 2-345 |
| 4 | MOTION IN LIMINE-CHARACTER OF THE COMPLAINANT- VICTIM IMPACT (FEB 27 01) | VOL. 2-348 |
| 5 | | |
| 6 | MOTION FOR PSYCHIATRIC EXPERT ASSISTANCE-ORDER (FEB 27 01) | VOL. 2-353 |
| 7 | MOTION FOR COURT REPORTER-ORDER (FEB 27 01) | VOL. 2-357 |
| 8 | MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS (FEB 27 01) | VOL. 2-360 |
| 9 | | |
| 10 | MOTION FOR ELECTION OF PUNISHMENT-ORDER (FEB 27 01) | VOL. 2-362 |
| 11 | MOTION FOR APPOINTMENT OF APPELLATE ATTORNEY PRIOR TO TRIAL (FEB 27 01) | VOL. 2-364 |
| 12 | | |
| 13 | MOTION TO ALLOW INCARCERATED DEFENDANT ACCESS TO A HOT MEAL-ORDER (FEB 27 01) | VOL. 2-367 |
| 14 | MOTION TO ALLOW INCARCERATED DEFENDANT ACCESS TO SHAVING-ORDER (FEB 27 01) | VOL. 2-371 |
| 15 | | |
| 16 | MOTION TO ORDER THE STATE TO DECIDE WHETHER TO MAKE A CHALLENGE FOR CAUSE OR PEREMPTORY STRIKE BEFORE DEFENDANT MUST DECIDE WHETHER TO MAKE A CHALLENGE FOR CAUSE OR PEREMPTORY STRIKE-ORDER (FEB 27 01) | VOL. 2-375 |
| 17 | | |
| 18 | | |
| 19 | DEFENDANT'S MOTION REGARDING THE SUBMISSION OF INDIVIDUAL JURORS FOR CHALLENGE FOR CAUSE IN VOIR DIRE PROCEEDINGS (FEB 27 01) | VOL. 2-377 |
| 20 | | |
| 21 | MOTION TO QUESTION VENIREMEN REGARDING MITIGATING EVIDENCE (FEB 27 01) | VOL. 2-379 |
| 22 | | |
| 23 | MOTION TO QUESTION VENIREMEN REGARDING THE BURDEN OF PROOF ON THE MITIGATION SPECIAL ISSUE (FEB 27 01) | VOL. 2-382 |
| 24 | | |
| 25 | MOTION TO VOIR DIRE VENIREMAN ON VICTIM CHARACTER/IMPACT TESTIMONY (FEB 27 01) | VOL. 2-385 |
| 26 | | |
| 27 | MOTION FOR DISCOVERY OF INFORMATION REGARDING PRIOR JURY SERVICE (FEB 27 01) | VOL. 2-389 |
| 28 | DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE (FEB 27 01) | VOL. 2-418 |
| 29 | | |
| 30 | REQUEST TO UTILIZE PEREMPTORY CHALLENGES FOLLOWING EXAMINATION OF THE ENTIRE VENIRE (FEB 27 01) | VOL. 2-420 |
| 31 | | |
| 32 | MOTION TO VOIR DIRE ON PAROLE LAW-40 YEAR MINIMUM (FEB 27 01) | VOL. 2-423 |
| 33 | | |

C L E R K ' S R E C O R D

Volume ONE of FOUR

Trial Court Cause Number F00-02424-NM

In the JUDICIAL District Court #194

of Dallas County, Texas,

Honorable H. ENTZ, Judge Presiding.

=====

THE STATE OF TEXAS, Plaintiff

vs.

JEDIDIAH ISAAC MURPHY, Defendant

=====

Appealed to the
Court of Criminal Appeals of Texas at Austin, Texas,
or Court of Appeals for the 5th District of Texas, at _____, Texas.

=====

Attorney for Appellant

Name ADAM SEIDEL

Address 2515 MCKINNEY AVE, STE 1400, DLS, TX 75201

Telephone No. 214-237-0835

Fax No. 17999290

SBOT No. JEDIDIAH ISAAC MURPHY

Attorney for: _____

=====

**FILED IN
COURT OF CRIMINAL APPEALS**

NOV 05 2001

Troy C. Bennett, Jr., Clerk

Delivered to the Court of Criminal Appeals of Texas at Austin, Texas,
or Court of Appeals for the _____ District of Texas, at _____, Texas.
on the _____ day of _____, _____.

signature of clerk _____

name of clerk _____

title _____

=====

Appellate Court Cause No. _____

Filed in the Court of Criminal Appeals of Texas at Austin, Texas,
or Court of Appeals for the 5th District of Texas, at _____, Texas,
this 25TH day of OCTOBER, 2001.

JIM HAMLIN, DALLAS COUNTY DISTRICT CLERK

By JANE MILLER, Deputy

FORM 355A

1 JEDIDIAH ISAAC MURPHY CAUSE NO. F00-02424-NM
 2 VS: IN THE 194TH JUDICIAL DISTRICT
 3 THE STATE OF TEXAS COURT OF DALLAS COUNTY, TEXAS
 4 =====

= INDEX =

| | | |
|----|--|-----------|
| 6 | CAPTION | VOL. 1-01 |
| 7 | TRUE BILL OF INDICTMENT (00 DEC 7) | VOL. 1-02 |
| 8 | TRIAL DOCKET | VOL. 1-04 |
| 9 | WRIT FOR SPECIAL VENIRE (15 DEC 00) | VOL. 1-08 |
| 10 | WRIT OF SPECIAL VENIRE (3 JAN 01) | VOL. 1-09 |
| 11 | LETTER FROM DLS CTY SHERIFF'S DEPT REGARDING | |
| 12 | MAILING JURY SUMMONS (FEB 14 01) | VOL. 1-10 |
| 13 | JACKSON V. DENNO MOTION FOR HEARING ON | |
| 14 | VOLUNTARINESS OR ANY ADMISSION OR CONFESSION | |
| 15 | WHETHER WRITTEN OR ORAL (01 MAY 31) | VOL. 1-11 |
| 16 | STATE'S DISCOVERY MOTION (00 DEC 19) | VOL. 1-13 |
| 17 | MOTION FOR DISCOVERY OF SPECIFIC ITEMS | |
| 18 | (01 MAR 12) | VOL. 1-15 |
| 19 | SECOND SPECIFIC MOTION FOR DISCOVERY (MAY 22 01) | VOL. 1-19 |
| 20 | STATE'S RESPONSE TO DEFENDANT'S SECOND SPECIFIC | |
| 21 | MOTION FOR DISCOVERY (MAY 29 01) | VOL. 1-24 |
| 22 | THIRD MOTION FOR DISCOVERY OF SPECIFIC ITEMS | |
| 23 | (CANNOT READ FILE DATE) | VOL. 1-33 |
| 24 | STATE'S RESPONSE TO DEFENDANT'S THIRD MOTION | |
| 25 | FOR DISCOVERY OF SPECIFIC ITEMS (MAY 25 01) | VOL. 1-36 |
| 26 | DEFENDANT'S FOURTH MOTION FOR DISCOVERY | |
| 27 | (JUNE 4 01)-ORDER | VOL. 1-38 |
| 28 | DEFENDANT'S FIFTH MOTION FOR DISCOVERY (2001 JUN 27) | VOL. 1-41 |
| 29 | SPECIFIC MOTION PURSUANT TO BRADY V. MARYLAND | |
| 30 | (01 MAY 22) | VOL. 1-43 |
| 31 | STATE'S RESPONSE TO DEFENDANT'S SPECIFIC MOTION | |
| 32 | PURSUANT TO BRADY V. MARYLAND (MAY 20 01) | VOL. 1-53 |
| 33 | DEFENDANT'S MOTION FOR NOTICE OF EXTRANEOUS | |
| | OFFENSES REASONABLY CONTEMPLATED BY THE | |
| | PROSECUTION TO BE INTRODUCED AT TRIAL | |
| | (31 MAY 01) | VOL. 1-62 |
| | NOTICE OF INTENT TO USE EXTRANEOUS AND | |
| | UNADJUDICATED OFFENSES (00 DEC 19) | VOL. 1-67 |

= CONTINUED =

PAGE 2

| | | |
|----|--|------------|
| 1 | SUPPLEMENTAL NOTICE OF INTENT TO USE | |
| 2 | EXTRANEEOUS AND UNADJUDICATED OFFENSES (01 APR 12) | VOL. 1-71 |
| 3 | SUPPLEMENTAL NOTICE OF INTENT TO USE EXTRANEEOUS | |
| 4 | AND UNADJUDICATED OFFENSES (01 MAY 9) | VOL. 1-74 |
| 5 | NOTICE OF INTENT TO USE CERTIFIED RECORDS | |
| 6 | (00 DEC 19) | VOL. 1-76 |
| 7 | MOTION TO DISCLOSE PLEA BARGAINS, DEALS AND/OR | |
| 8 | GRANTS OF IMMUNITY (01 MAY 31) | VOL. 1-78 |
| 9 | MOTION FOR DISCOVERY OF CERTAIN INFORMATION | |
| 10 | REGARDING POTENTIAL WITNESSES FOR THE STATE | |
| 11 | PURSUANT TO BRADY V. MARLAND TEXAS CODE OF | |
| 12 | CRIM PROCEDURE (01 MAR 1) | VOL. 1-80 |
| 13 | MOTION TO DISCLOSE EXPERT WITNESSES AND OPINIONS | |
| 14 | (00 DEC 19) | VOL. 1-83 |
| 15 | DISCLOSURE OF EXPERT WITNESSES (01 FEB 21) | VOL. 1-85 |
| 16 | DISCLOSURE OF EXPERT WITNESSES (MAY 25 01) | VOL. 1-87 |
| 17 | STATE'S MOTION TO TAKE DEFENSE EXPERT ON | |
| 18 | VOIR DIRE (01 MAR 1) | VOL. 1-90 |
| 19 | STATE'S MOTION TO AUTHORIZE DISCLOSURE OF | |
| 20 | PATIENT INFORMATION (00 DEC 12) | VOL. 1-92 |
| 21 | MOTION REQUESTING NOTICE OF DEFENDANT'S | |
| 22 | INTENT TO INTRODUCE FUTURE DANGEROUSNESS EXPERT | |
| 23 | TESTIMONY (00 DEC 19) | VOL. 1-95 |
| 24 | STATE'S SUPPLEMENTAL LIST OF POSSIBLE WITNESSES | |
| 25 | (MAY 29 01) | VOL. 1-97 |
| 26 | ORDER ALLOWING DEFENDANT'S CRIME SCENE EXPERT | |
| 27 | ACCESS TO VICTIM'S CAR (01 MAY 17) | VOL. 1-99 |
| 28 | STATE'S MOTION IN LIMINE (01 MAR 1) | VOL. 1-100 |
| 29 | STATE'S MOTION IN LIMINE REGARDING MITIGATION | |
| 30 | EVIDENCE (01 MAR 1) | VOL. 1-103 |
| 31 | MOTION IN LIMINE REGARDING PHOTOGRAPHS (JUN 4 01) | VOL. 1-105 |
| 32 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN | |
| 33 | LIMINE REGARDING PHOTOGRAPHS (01 MAR 1) | VOL. 1-107 |
| 34 | MOTION IN LIMINE REGARDING EXTRANEEOUS TRANS- | |
| 35 | ACTIONS (JUN 4 01) | VOL. 1-111 |
| 36 | MOTION IN LIMINE REGARDING ALLEGED EVIDENCE | |
| 37 | OF SEXUAL ASSAULT OF VICTIM (JUN 4 01) | VOL. 1-114 |
| 38 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN | |
| 39 | LIMINE REGARDING PUNISHMENT ARGUMENT (01 MAR 1) | VOL. 1-117 |
| 40 | STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE | |
| 41 | REGARDING VICTIM IMPACT-CHARACTER TESTIMONY | |
| 42 | (01 MAR 1) | VOL. 1-119 |

FORM 355A

= CONTINUED =

PAGE 3

| | | |
|----|---|-------------|
| 1 | STATE'S RESPONSE TO DEFENDANT'S MOTION TO | |
| 2 | VOIR DIRE ON CHARACTER; VICTIM IMPACT TESTIMONY | |
| | (01 MAR 1) | VOL. 1-122 |
| 3 | MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A | |
| 4 | WARRANT (01 MAY 31) | VOL. 1-125 |
| 5 | MOTION TO SUPPRESS STATEMENTS (01 MAY 31) | VOL. 1-127 |
| 6 | MOTION TO SUPPRESS ITEMS SEIZED FROM DEFENDANT'S | |
| | CELL AT DALLAS COUNTY JAIL (01 JUN 6) | VOL. 1-130 |
| 7 | MOTION TO ALLOW QUESTIONING OF VENIRE REGARDING | |
| 8 | SPECIFIC ISSUES IN THIS CASE (01 MAR 13) | VOL. 1-133 |
| 9 | STATE'S RESPONSE TO DEFENDANT'S MOTION REGARDING | |
| | PRIOR JURY SERVICE (01 MAR 1) | VOL. 1-137 |
| 10 | STATE'S RESPONSE TO DEFENDANT'S REQUEST TO | |
| 11 | UTILIZE PEREMPTORY CHALLENGES FOLLOWING | |
| | EXAMINATION OF THE ENTIRE VENIRE (01 MAR 1) | VOL. 1-139 |
| 12 | MOTION TO DENY TELEVISION CAMERAS FROM FILING | |
| 13 | ANY PART OF THE TRIAL (01 MAR 1) | VOL. 1-142 |
| 14 | ORDER CONCERNING MEDICAL EXPERTS AND EXAMINATIONS | |
| | (JUN 4 01) | VOL. 1-147 |
| 15 | MOTION FOR JURY INSTRUCTIONS REGARDING EVIDENCE | |
| 16 | INTRODUCED AT PUNISHMENT FOR CONSIDERATION OF | |
| | SPECIAL ISSUES (01 JUN 12) | VOL. 1-148 |
| 17 | MOTION FOR MISTRIAL PURSUANT TO THE DECISION | |
| 18 | OF THE UNITED STATES SUPREME COURT IN PENRY II | |
| | (01 JUN 5) | VOL. 1-152 |
| 19 | CHARGE OF THE COURT (GUILT/INNOCENCE)(JUN 11 01) | VOL. 1-169 |
| 20 | JURY VERDICT ON GUILT | VOL. 1-189 |
| 21 | NOTE FROM JURY TO COURT (01 JUN 30) | VOL. 1-190 |
| 22 | MOTION FOR MISTRIAL BASED ON UNCONSTITUTIONAL | |
| 23 | APPLICATION OF PROSECUTORIAL DISCRETION IN | |
| 24 | DEATH PENALTY CASES IN DALLAS COUNTY-EXHIBITS- | |
| | (01 JUN 26) | VOL. 1-191 |
| 25 | CHARGE OF THE COURT (PUNISHMENT) | VOL. 1-205 |
| 26 | JURY VERDICT ON GUILT | VOL. 1-214 |
| 27 | JUDGMENT/SENTENCE (06-30-01) | VOL. 1-215 |
| 28 | DEFENDANT'S MOTION FOR NEW TRIAL/ORDER | |
| 29 | (JUL 30 01) | VOL. 1-219 |
| 30 | DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH | |
| 31 | APPOINTMENT OF ATTORNEY ON APPEAL/ORDER | |
| | (JUN 30 01) | VOL. 1-220 |
| 32 | ORDER APPOINTING COUNSEL PURSUANT TO ARTICLE | |
| | 11.071 C.C.P. (12 SEP 01) | VOL. 1-221C |
| 33 | | |

FORM 355A

= CONTINUED =

PAGE 3

| | | |
|----|--|------------|
| 1 | MOTION TO VIDEOTAPE THE INDIVIDUAL VOIR DIRE (FEB 27 01) | VOL. 2-427 |
| 2 | | |
| 3 | MOTION FOR PRODUCTION OF WITNESS STATEMENTS (FEB 27 01) | VOL. 2-431 |
| 4 | MOTION FOR PRODUCTION OF WITNESS STATEMENTS (FEB 27 01) | VOL. 2-431 |
| 5 | | |
| 6 | MOTION TO SUPPRESS PHYSICAL EVIDENCE (FEB 27 01) | VOL. 2-434 |
| 7 | MOTION TO SUPPRESS STATEMENTS (FEB 27 01) | VOL. 2-436 |
| 8 | | |
| 9 | DEFENDANT'S MOTION FOR DISCOVERY OF BRADY MATERIAL REGARDING CONFESSIONS, STATEMENTS AND ORAL DECLARATIONS THAT LED TO PREVIOUSLY UNDISCOVERED EVIDENCE (FEB 27 01) | VOL. 2-439 |
| 10 | | |
| 11 | MOTION TO EXCLUDE EVIDENCE OF UNADJUDICATED EXTRANEOUS OFFENSES DURING THE PUNISHMENT PHASE, OR REQUIRE A LIVE-LINE-UP (FEB 27 01) | VOL. 2-443 |
| 12 | | |
| 13 | MOTION FOR IDENTIFICATION HEARING AND TO EXCLUDE EVIDENCE OF ILLEGAL IDENTIFICATION (FEB 27 01) | VOL. 2-448 |
| 14 | | |
| 15 | DEFENDANT'S MOTION FOR LIST OF STATE'S WITNESSES (FEB 27 01) | VOL. 2-451 |
| 16 | | |
| 17 | DEFENDANT'S MOTION REGARDING VICTIM CHARACTER/ IMPACT TESTIMONY AFTER MOSELY VS. STATE (FEB 27 01) | VOL. 2-456 |
| 18 | | |
| 19 | CLERK'S CERTIFICATE THAT APPELLATE RECORD IS TRUE AND CORRECT (25 OCT 01) | VOL. 2-460 |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |
| 26 | | |
| 27 | | |
| 28 | | |
| 29 | | |
| 30 | | |
| 31 | | |
| 32 | | |
| 33 | | |

FORM 355A

JEDIDIAH ISAAC MURPHY

CAUSE NO. F00-02424-MN

VS:

IN THE 194TH JUDICIAL DISTRICT

THE STATE OF TEXAS

COURT OF DALLAS COUNTY, TEXAS

= INDEX =

VOL. 3 OF 4: PAGES 461 THRO 724:NOTICE OF FILING OF BUSINESS RECORDS PURSUANT
TO RULE 902(10)-AFFIDAVITS (00 DEC 19)

VOL. 3-461

NOTICE OF FILING OF BUSINESS RECORDS PURSUANT
TO RULE 902(10)-AFFIDAVIT (01 JAN 9)

VOL. 3-480

STATE'S PRODUCTION OF DOCUMENTS (01 JAN 16)

VOL. 3-519

NOTICE OF FILING OF BUSINESS RECORDS PURSUANT
TO RULE 902(10) (01 JAN 30)-AFFIDAVIT

VOL. 3-582

NOTICE OF INTENT TO USE CERTIFIED RECORDS
(01 APR 30)

VOL. 3-603

NOTICE OF FILING OF BUSINESS RECORDS PURSUANT
TO RULE 902(10)-AFFIDAVIT (01 MAY 2)

VOL. 3-642

CLERK'S CERTIFICATE THAT APPELLATE RECORD IS
TRUE AND CORRECT (10 25 01)

VOL. 3-724

FORM 355A

1 JEDIDIAH ISAAC MURPHY CAUSE NO. F00-02424-NM
 2 VS: IN THE 194TH JUDICIAL DISTRICT
 3 THE STATE OF TEXAS COURT OF DALLAS COUNTY, TEXAS
 4 =====

5 = INDEX =

6 VOL. 4 OF 4: PAGES 725 THRO 916:

7
 8 NOTICE OF FILING OF BUSINESS RECORDS PURSUANT
 TO RULE 902(10)(00 DEC 12) VOL. 4-725
 9 STATE'S PRODUCTION OF DOCUMENTS (01 MAR 13) VOL. 4-727
 10 STATE'S PRODUCTION OF DOCUMENTS (01 MAR 20) VOL. 4-729
 11 GARLAND POLICE DEPT INCIDENT/INVESTIGATION
 REPORT (OCT 4 00) VOL. 4-731
 12 GARLAND POLICE DEPT INVESTIGATIVE NOTES VOL. 4-735
 13 GARLAND POLICE DEPT FORENSIC INVESTIGATIONS
 14 UNIT EVIDENCE LOG VOL. 4-785
 15 CITY OF GARLAND POLICE DEPT INVENTORY OF
 16 RECOVERED PROPERTY VOL. 4-808
 17 CITY OF GARLAND POLICE DEPT AFFIDAVIT IN
 ANY FACT (5 OCT 00) VOL. 4-813
 18 VAN ZANDT COUNTY SHERIFF'S REPORT (OCT 10 00) VOL. 4-845
 19 TERRELL POLICE DEPT CRIM INVESTIGATION
 20 DIVISION SUPPLEMENT REPORT (10 06 00) VOL. 4-859
 21 BUSINESS RECORD AFFIDAVIT (01 MAY 15)/MHMR VOL. 4-862
 22 BUSINESS RECORD AFFIDAVIT (01 MAY 15)/FRUITVALE
 INDEPENDENT SCHOOL DISTRICT VOL. 4-865
 23 BUSINESS RECORD AFFIDAVIT (01 MAY 15)-PRES
 24 BYTERIAN HOSPITAL VOL. 4-878
 25 TIME SCHEDULE OF VICTIM AND DEFENDANT VOL. 4-907
 26 CRIME SCENE SEARCH REPORT BY CTY OF DLS SHEFFIFF'S
 27 DEPT (05.06 01) VOL. 4-914
 28 CLERK'S CERTIFICATE THAT APPELLATE RECORD IS
 TRUE AND CORRECT (10 25 01) VOL. 4-916
 29
 30
 31
 32
 33

FORM 355A

= CONTINUED =

PAGE 4

| | | |
|---|---|------------|
| 1 | ORDER REMOVING COUNSEL (4 OCT 01) | VOL. 1-222 |
| 2 | ORDER APPOINTING COUNSEL PURSUANT TO ARTICLE | |
| | 11.071 C.C.P. (4 OCT 01) | VOL. 1-223 |
| 3 | | |
| 4 | DEFENDANT'S REQUEST FOR CLERK'S AND COURT | |
| | REPORTER'S RECORD AND EXHIBITS ON APPEAL-ORDER | |
| | (01 JUL 11) | VOL. 1-224 |
| 5 | | |
| 6 | REQUEST FOR COURT REPORTER' RECORD (01 JUL 11) | VOL. 1-231 |
| 7 | | |
| 8 | PEREMPTORY JURY CHALLENGE (DEFENSE) (01 MAY 31) | VOL. 1-232 |
| 9 | PEREMPTORY JURY CHALLENGE (STATE) (01 MAY 31) | VOL. 1-233 |
| | | |
| | CLERK'S CERTIFICATE THAT APPELLATE RECORD IS | |
| | TRUE AND CORRECT (10 25 01) | VOL. 1-234 |

10

11

12

13

14

15

16

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18

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Caption:

The State of Texas X

County of Dallas X

= DEATH SENTENCE APPEAL =

In the 194TH JUDICIAL DISTRICT COURT of Dallas County, Texas, the
Honorable HAROLD ENTZ, Judge Presiding, the following
proceedings were held and the following instruments and other papers were filed
in this cause, to wit:

Trial Court Cause No. F00-02424-NM

The State of Texas

vs.

JEDIDIAH ISAAC MURPHY

X
X
X
X
X

In the 194TH JUDICIAL

District Court _____, of

Dallas, County, Texas

FORM 188-B

DEFENDANT MURPHY, JEDIDIAH ISAAC WM 090175 CHARGE CAP MUR FEL
REINDICTMENT
 ADDRESS 1718 BARCLAY, RICHARDSON, TX LOCATION DSO
 FILING AGENCY TX0571100 DATE FILED 10/18/00 COURT _____
 COMPLAINANT CUNNINGHAM, BERTIE F00-02424
 C/C _____

TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS: The Grand Jury of Dallas County,
 State of Texas, duly organized at the JULY Term, A.D. 20 00 of the
195TH JUDICIAL District Court _____, Dallas County, in said court at said

Term, do present that one JEDIDIAH ISAAC MURPHY, defendant,

on or about the 4TH day of OCTOBER A.D. 20 00 in the County of Dallas and said State, did

unlawfully then and there knowingly and intentionally cause the death
 of BERTIE CUNNINGHAM, an individual, hereinafter called deceased, by
 shooting the said deceased with a firearm, a deadly weapon, and by
 drowning the said deceased in water, and the defendant intentionally
 did cause the death of the deceased while the said defendant was in
 the course of committing and attempting to commit the offense of
 KIDNAPPING and ROBBERY of the deceased,

against the peace and dignity of the State.

BILL HILL

Criminal District Attorney of Dallas County, Texas.

COURT

Foreman of the Grand Jury 00002

DEPARTMENT OF
CORRECTIONS

MURPHY, JEREMY L. 000175

1115 BARRETT, RICHARDSON, TX

TX0271100 1018100

CUNNINGHAM, BERTIE

100-02424

JULY

100TH JUDICIAL

JEREMY L. MURPHY

OCTOBER

11TH

unlawfully then and there knowingly and intentionally cause the death of BERTIE CUNNINGHAM, an individual, hereinafter called deceased, by shooting the said deceased with a firearm, a deadly weapon, and by throwing the said deceased in water, and the defendant intentionally did cause the death of the deceased while the said defendant was in the course of committing and attempting to commit the offense of KIDNAPING and ROBBERY of the deceased,

FILED
00 DEC -7 AM 10:02
JIM HAMLIN
DISTRICT CLERK
DALLAS CO. TEXAS
DEPUTY

000003

TRIAL DOCKET - CRIMINAL DISTRICT COURT -- DALLAS COUNTY, TEXAS

No. ~~FOO-02424-NM~~

| STATE OF TEXAS | ATTORNEYS | OFFENSE | DATE OF FILING |
|-----------------------|--|--|-------------------|
| JEDIDIAH ISAAC MORPHY | Jane Little / Will Byrd Jr 10/17/00 | CAPITAL MURDER, A CAPITAL FELONY OFFENSE AS CHARGED IN THE INDICEMENT/FEL/REINDICEMENT | DECEMBER 07, 2000 |
| DATE OF ORDER | ORDERS OF COURT | | |
| 12-13-00 | and 12-14-00 | not ordered to 14th | |
| 12-14-00 | MAN 2-2-01 | grossed down | |
| 2-2-01 | " 3-2-01 | " " | |
| FEB 15 2001 | UNE 2-21-01 | | |
| 2-20-01 | 2-22-01 | | |
| FEB 26 2001 | 1) cleared in 1st - put Little 3404 C.C.D. - possible 2) not in good standing - Witnesses should be heard by Defense - Tim E. Lewis. | | |
| 3-1-01 | 3-02-01 | Don't live pasted per Henry - 1/2 | |
| 3-12-01 | 3-12-01 | Substantial questioning - 1/3 | |
| MAR 12 2001 | " " | " " | |
| MAR 14 2001 | " " | " " | |
| MAY 11 2001 | Ray Tolson was in witness of A. [Signature] [Signature] [Signature] Also 2 Tonya Thayer, Chelsea Willis, Ruby Delacruz & Rob Murray | | |

STATE OF TEXAS

vs. No. _____

DATE OF ORDER

ORDERS OF COURT

5/22/01

MAY 31 2001

JUN 4 2001

JUN 6 2001

JUN 5 2001

W. Thomas Mathew Sean Sum at the request of June L. H., (P. 311) before

the 5th Appellate District, 4th Court, Dallas, Texas, on May 21-24, 2001.

Individuals appearing at the hearing were identified as follows: (P. 311) at which time 48 jurors were identified -

in addition to the jury list of 100 (P. 311) jurors - Jackson

jurors conducted - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

challenge denied - challenge denied - Jackson & Jones -

00005

TAIL

TRIAL DOCKET - CRIMINAL DISTRICT COURT - DALLAS COUNTY, TEXAS

No. 1-00-02424-NMG

00006

| STATE OF TEXAS | ATTORNEYS | OFFENSE | DATE OF FILING |
|-----------------------|---------------------|----------------|----------------|
| JEDIDIAH ISAAC MURPHY | LITTLE-BYCK-BACIDON | CAPITAL MURDER | 12-07-00 |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

DATE OF ORDER

ORDERS OF COURT

JUN 6 2007

3310 AHE-JOHAN PS BARO SHERLEY - RUCZSOLEK HAZELAN

JUN 7 2001

(2) ВЕРДЕН ДЕН 11. П. КИЕВУН (8) ИДИНИС АПСІОН - Далеко
в адмал (Криван Насиди) (2) АДРОТ (настл) (3) Боднам (настл)
(4) ГЛЕСКЕ (8) ВОД ДЕН ДЕН 11. (настл)

JUN 8 2001

John Doe - 1001 8th St, New York, NY 10001

JUN 11 2001

APR 8 1964
Dear Mr. and Mrs. [unclear]
I am sorry to hear that you are
leaving for London - I hope you
will have a very successful
trip. I am sure you will
enjoy it very much.
Yours truly,
[unclear]

JUN 12 2001

(1) ALICE - (O) CHARGED (2) ELIZABETH - (O) CHARGED
 (3) ROSE - (O) CHARGED (4) S.O. (O) CHARGED (5) SULLIVAN - (O) CHARGED
 (6) ALB

79 ALBERT (HERBELL P.D.) (5) LEE VAS (WILLIS P.D.) (8) STANLEY JOHN (HUBERT P.D.)

9) WILHELM SHARON STAUTON VAN (m. 1888, DOUGLAS BRISTOL 1912)

JUN 13 2001

(1) KIRK MADDY - Salt Lake City
 (2) SHEETS CHESTNUT - BUREAU OF GEOLOGY
 (3) SHEETS CHESTNUT - BUREAU OF GEOLOGY
 (4) BAKER JOHN D. S.O.
 (5) BOOTHMAN (read)
 (6) RAIL MADDY - Salt Lake City
 (7) REER TH. L. & FORDS MURIELL, D.S.O.

CAUSE NO. F00-02424-NM

| | | |
|------------------------------|---|-----------------------|
| THE STATE OF TEXAS | § | IN THE 194TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| <u>JEDIDIAH ISAAC MURPHY</u> | § | DALLAS COUNTY, TEXAS |

WRIT FOR SPECIAL VENIRE

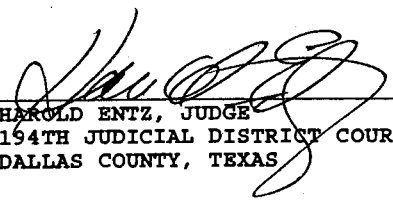
It appearing to the Court that a motion for Special Venire was filed in the above-numbered and styled cause, and;

It further appearing to this Court that this cause is a capital case;

IT IS THEREFORE THE ORDER of this Court that a writ for special venire be and hereby is granted;

IT IS FURTHER ORDERED AND COMMANDED that the Sheriff of Dallas County, Texas summon by mail 2300 persons to appear in the Central Jury Room, Dallas County, Texas at the Frank Crowley Criminal Courts Building, 133 North Industrial Blvd., Dallas, Texas at 9:00 a.m. on Friday, February 2, 2001 for jury duty in the above-numbered and styled cause.

SIGNED this the 15th day of December, 2000.



HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

CAUSE NO. F00-02424-NM

| | | |
|------------------------------|---|-----------------------|
| THE STATE OF TEXAS | § | IN THE 194TH JUDICIAL |
| | § | |
| VS. | § | DISTRICT COURT OF |
| | § | |
| <u>JEDIDIAH ISAAC MURPHY</u> | § | DALLAS COUNTY, TEXAS |

WRIT FOR SPECIAL VENIRE

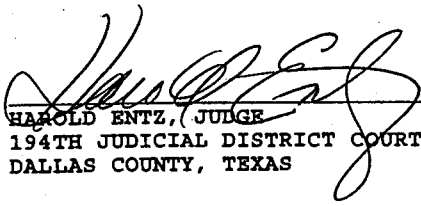
It appearing to the Court that a motion for Special Venire was filed in the above-numbered and styled cause, and;

It further appearing to this Court that this cause is a capital case;

IT IS THEREFORE THE ORDER of this Court that a writ for special venire be and hereby is granted;

IT IS FURTHER ORDERED AND COMMANDED that the Sheriff of Dallas County, Texas summon by mail 2300 persons to appear in the Central Jury Room, Dallas County, Texas at the Frank Crowley Criminal Courts Building, 133 North Industrial Blvd., Dallas, Texas at 9:00 a.m. on Friday, March 2, 2001 for jury duty in the above-numbered and styled cause.

SIGNED this the 3rd day of January, 2001.


HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

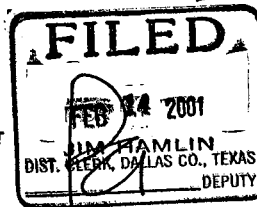
WRIT FOR SPECIAL VENIRE - Solo Page

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"Proudly Serving Since 1846"
DALLAS COUNTY SHERIFF'S DEPARTMENT
FRANK CROWLEY COURTS BUILDING
133 NORTH INDUSTRIAL BOULEVARD, LB-31
DALLAS, TEXAS 75207-4313



Plt 3.2.01

February 08, 2001

Honorable Harold Entz
194th Judicial District Court
Frank Crowley Courts Building
133 N. Industrial Blvd.
Dallas, Texas 75207-4313

RE: The State of Texas vs. JEDIDIAH ISAAC MURPHY
Cause No. F00-02424-NM


Dear Judge Entz,

In regard to the referenced cause and your writ for a special venire dated January 3, 2001 this Department did place in the U.S. Mail the special venire jury summons on Thursday, February 8, 2001 as ordered.

The list of two thousand three-hundred (2300) names was furnished from the jury wheel in Data Services. The official jury summons commanded them to appear at 8:30 a.m. on March 2, 2001 in the Central Jury Room at the Frank Crowley Courts building for jury duty.

Sincerely,

JIM BOWLES
SHERIFF
Dallas County, Texas


D.J. Chandler
Chief Deputy
Office of General Services

JB:DJC:SM

FILED
THE STATE OF TEXAS
2001 MAY 31 AM 9:30
v. JIM HAMLIN
DISTRICT CLERK
JEDIDIAH ISAAC MURPHY
CLERK

CAUSE NO. F00-02424-M

§ IN THE 194TH JUDICIAL
§
§ DISTRICT COURT OF
§
§ DALLAS COUNTY, TEXAS
§

JACKSON V. DENNO MOTION FOR HEARING ON VOLUNTARINESS
OF ANY ADMISSION OR CONFESSION WHETHER WRITTEN OR ORAL

THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant in the above entitled and numbered causes, and respectfully requests this Court to have a hearing before trial to determine the voluntariness of, or in the alternative, excuse the jury before any evidence of:

1. Admissions (whether written or oral);
2. Confessions (whether written or oral).

Defendant makes this request based on the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America, Article I, § 10, 13, and 19 of the Constitution of the State of Texas, and Articles 38.21, 38.22, and 38.23 of the Texas Code of Criminal Procedure.

Defendant further requests the Court to instruct the prosecuting attorney and his assistants to ask no questions in the presence of the jury concerning (1) admissions, and (2) confessions, whether oral or written or whether criminative or exculpatory until a *Jackson v. Denno* hearing has been given the Defendant with findings of fact and conclusions of law by the Court.

Defendant further says that at the time of various conversations with certain police


JACKSON V. DENNO--MOTION FOR HEARING ON
VOLUNTARINESS--Page 1 of 2 pages

00011

officers, the Defendant was either under arrest or substantially deprived of his freedom by the attendant conduct of the officers and the surrounding circumstances.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion be granted.

Respectfully submitted,



JENNIFER BALIDO
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214)653-3550
SBN: 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion has been hand-delivered to the Dallas County District Attorney's Office on this the 31 day of May, 2001.



JENNIFER BALIDO

ORDER

Came to be heard Defendant's *Jackson v. Denno* Motion for Hearing on Voluntariness of any Admission or Confession whether Written or Oral, and said Motion is hereby (GRANTED) (DENIED).

SIGNED this the _____ day of _____, 2001

JUDGE PRESIDING

FILED F00-02424-M
2000 DEC 19 AM 9:17
THE STATE OF TEXAS §
DISTRICT CLERK §
DALLAS COUNTY, TEXAS §
V. §
JEDIDIAH ISAAC MURPHY §

IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

STATE'S DISCOVERY MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Motion and respectfully shows:

I.

The State requests the Court to order the defendant to produce any and all business records which the defendant plans to introduce by affidavit under Rule 902(10) of the Texas Rules of Evidence.

II.

The State requests the Court to order the defendant to provide the State with the original or duplicates of any writing, recording or photograph of which the defendant plans to offer or summaries of the same under Rule 1006 of the Texas Rules of Evidence.

III.

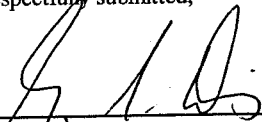
The State requests the Court to order the defendant to provide the State with any written document the defense will use against a State's witness for the purpose of showing the witness's bias or interest under Rule 613(b) of the Texas Rules of Evidence.

IV.

The State requests the defendant to provide the State with a written transcribed or recorded statement of each defense witness under Rule 615 of the Texas Rules of Evidence.

WHEREFORE, the State prays the Court grant this Motion.

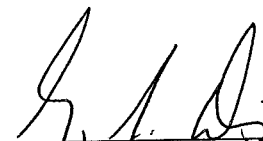
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 19th day of December, 2000.



GREGORY S. DAVIS

FILED
F00-02424-M AND F00-23910-M
2001 MAR 12 PM 2:24
IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS
JIM GARDIN
DISTRICT CLERK
A. COOPER

THE STATE OF TEXAS §
V. §
JEDIDIAH ISAAC MURPHY §

MOTION FOR DISCOVERY OF SPECIFIC ITEMS

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW the Defendant, in the above titled and numbered cause, by and through his attorney of record, and makes this his Motion for Discovery of Specific Items, and in support of said motion would show the following:

I.

Defendant requests that the following items be supplied to defense counsel, copies of items supplied to defense counsel, or defense counsel be allowed to examine such items outside the presence of the State:

1. the monthly statement (or other record of purchases made) of any credit card belonging to complainant, Bertie Cunningham, for the dates surrounding her death and the arrest of Defendant;
2. records of any jewelry allegedly taken from complainant, Bertie Cunningham, and the circumstances surrounding its recovery, if any;
3. the car belonging to complainant, Bertie Cunningham, subsequently allegedly found in the possession of Defendant, any reports regarding any evidence retrieved from the car, including but not limited to: fingerprints taken from inside

or outside the vehicle, blood evidence, and trace evidence. Specifically, to this item, the Defendant requests that his counsel and any other relevant party be allowed to personally view and inspect the vehicle outside the presence of the State.

4. any and all photos to be used in the guilt/innocence stage or punishment stage of the trial;
5. any and all police reports, offense reports, detective's notes, officer's notes, "whip out books", or other notes or reports from the following police agencies, including but not limited to Garland Police Department, Plano Police Department, Richardson Police Department, Collin County Sheriff's Office, Dallas County Sheriff's Office, Tarrant County Sheriff's Office, Kaufman County Sheriff's Office, Van Zandt County Sheriff's Office, Edgewood Police Department, Kaufman Police Department, Dallas Police Department, Arlington Police Department, Wichita Falls Police Department, and Wichita County Sheriff's Office;
6. any videos allegedly depicting Defendant;
7. any videos allegedly depicting complainant, Bertie Cunningham;
8. a clear readable copy of any line-up shown to any witness and any report regarding any line-up shown to any witness in regard to this case, the alleged kidnapping in Arlington, Texas or the alleged robbery in Wichita Falls, Texas;
9. any and all information regarding the complete criminal history of and present whereabouts of Howard McClesky or John Egbert Warren, two men questioned by the Wichita Falls, Texas Police in regard to the robbery of Margie Ellis on or

about August 26, 1997 .

II.

Defendant would show that each of the above mentioned items are in the exclusive control of the State and not available to the Defendant through any investigatory tool. Additionally, these items may lead to relevant evidence for the Defense that cannot be found without viewing these items. Further, the denial of this Motion would deny the Defendant: the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure; the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 15 of the Texas Constitution, and Articles 1.05 and 36.29 of the Texas Code of Criminal Procedure; and Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution and Due Course of Law under Article I, Section 19 of the Texas Constitution, and Article 1.04 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grants his Motion in all things.

Respectfully Submitted,

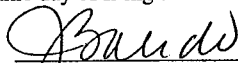

Jennifer Balido

Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the above motion to Greg Davis, Assistant District Attorney of Dallas County, Texas on the same day of filing therewith.



Jennifer Balido

ORDER

Having considered the foregoing motion and arguments of counsel, if any, the Motion is hereby _____ (Granted/ Denied)

This the _____ day of _____, 2001.

Judge Presiding

F00-02424-M

FILED

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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§
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§
§

IN THE 194TH JUDICIAL
JIM M. MILLER
DISTRICT COURT OF
DEPUTY
DALLAS COUNTY, TEXAS

SECOND SPECIFIC MOTION FOR DISCOVERY

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW THE DEFENDANT, by and through his counsel of record, and makes this, his Second Specific Motion for Discovery, and in support of this motion would show the following:

I.

Defendant requests the following items from the State:

1. Videotape of scene of discovery of victim's body in Van Zandt County, specifically mentioned in the statement prepared by Van Zandt County Sheriff's Officer DeCoux.
2. Any police report, notes or other statement generated by Jason Bonham of the Edgewood Police Department.
3. Any physical evidence (such as video or audio recordings or closed circuit television capability) or notes, reports, whip out books, etc. reflecting any and all attempts to interview or actual interviews of Defendant regarding the facts surrounding this case.
4. Videotape of Defendant and Zachary Mamot allegedly riding mopeds in Huffines Park in Richardson.
5. Any and all physical evidence that Defendant waived his rights under 38.22 of the Texas Code of Criminal Procedure and *Miranda v. Arizona*, including any signed waivers, signed statements by person allegedly giving those warnings, any notes, memoranda, or reports reflecting that those warnings were or were not given and when, any "Dear Chief" letters regarding this interrogation;
6. Items given by Defendant to Phillip Cruz to give to Defendant's daughter on or

00019

about October 6, 2000;

7. The Affidavits of Christy Baugh, Paul Previtt, and Treshod Tarrant;
8. The Affidavits of Ashley Thorpe and Tonya Thorpe, Zachary Mamot and Ryan Hammond;
9. Any information regarding "Lisa, telephone number 903-567-4133" in Van Zandt County police report;
10. Any police report generated by any member of the Edgewood Police Department.
11. Any handwritten or typewritten notes, whip-out books, "Dear Chief" letters, reports or other memorandum generated by any one of the officers that constituted the arrest team of Defendant, including, but not limited to Rose, Goodson, D. Pool, R. Pool, Godley and DeCoux of the Van Zandt County Sheriff's Office and Heath Burton (civilian) of the Van Zandt County Sheriff's Office; Strange of the Delta County Sheriff's Office; Keener of the Wills Point Police Department; Bonham of the Edgewood Police Department; Lay, Myers, and Tooke of the Garland Police Department; Peavy of the Terrell Police Department;
12. The total number of times any member of a police agency attempted to speak to Defendant while in custody, regardless of whether counsel had been appointed or whether counsel had communicated with Defendant;
13. Any "crimestoppers" information from Dallas, Kaufman, of Van Zandt counties regarding the events of this case;
14. Any information, including entire criminal history, *modus operandi*, and any other information tying suspects McClesky and Warren to the purse-snatching or robbery that occurred on or about August 27, 1997 in Wichita Falls, Texas and involved the vehicle stolen earlier from Sherryll Wilhelm in Arlington, Texas;
15. Any "crimestoppers" information regarding the alleged kidnapping of Sheryl Wilhelm in Arlington, Texas on or about August 26, 1997;
16. The names and locations of interviews of any person incarcerated in the Dallas County Jail and interviewed by the State or its agents;
17. The name and address of any person interviewed by the State or its agents who was told by the Defendant that he ACCIDENTALLY caused the death of Bertie Lee Cunningham;
18. The name and address of any person interviewed by the State or its agents who was told by the Defendant that he was INTOXICATED at the time of the offense;

19. The name and address of any person who has told the State or its agents that Defendant was REMORSEFUL OR SAD about the death of the victim, Bertie Cunningham; or was REMORSEFUL OR SAD at the time surrounding the death of Bertie Cunningham;
20. The name and address of any person who has told the State or its agents the Defendant seemed suicidal on the days preceding or the day of October 4, 2000.
21. The name and address of any person who has told the State or its agents that Defendant or any of his siblings, birth or adopted, were physically, sexually, or emotionally abused at any point in their lives;
22. Any attempt made, successful or unsuccessful, to talk to any person incarcerated by the State of Texas or its agents in any capacity, or on probation or parole supervised by the State of Texas or its agents, in regard to this case;
23. The criminal history contained in TCIC or NCIC of any witness the State has interviewed (including police officers or other government agents), whether or not the State intends to call them as witnesses in their case;
24. Any and all reports from the sexual assault examination kit taken from the victim, Bertie Cunningham, including any conclusions drawn from the results of such examination.
25. The name and address of any person employed by any police agency in this or any county, or the District or County Attorney's office in this or any county, or any person employed by the Texas Board of Pardons and Paroles who has evaluated the credibility and believability of Treshod Tarrant, and had determined that he is not credible or not believable.
26. The criminal record of Treshod Tarrant, including, but not limited to, TCIC and NCIC, any alleged involvement of criminal activity, or any allegation that he was engaged in, either alone or as a party, any criminal activity, any crime in which he was a suspect, and any recommendations or evaluations made by any employee of the Texas Board of Pardons and Paroles in regard to his current parole status;
27. Any videotape, audiotape or closed circuit television equipment available for use by the Garland Police Department in its interrogation rooms, whether or not used in this case, and a copy of the videotape or audiotape of the interrogation of Defendant, if one exists, or the names or addresses of those people who observed the interrogation of Defendant by closed circuit television, if they did; or the names and addresses of any one who observed the interrogation of Defendant but was not in the same room as defendant, and any reports made or notes taken of such observation;

28. The internal procedures of the Garland Police Department in regard to the interrogation of suspects and the taking of a voluntary statement;
29. The internal procedures of the Arlington Police Department in regard to the creation of a composite drawing used in the investigation of a criminal offense.

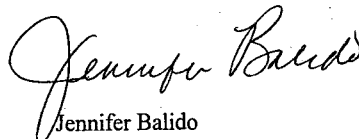
II.

Defendant asserts that these items are in the exclusive possession of the State of Texas or its agents, and that the discovery of such items is possible only through the granting of Defendant's motion.

III.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grant his second motion for discovery in all things.

Respectfully Submitted,



Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214)653-3550
SBN 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I served by my own hand a copy of the foregoing motion on the
Dallas County District Attorney's Office on the 22 day of May, 2001.



Jennifer Balido

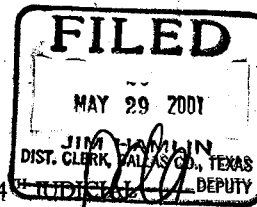
ORDER

Having considered the foregoing motion, relevant case law and arguments of counsel,
that motion is hereby _____.

This the _____ of _____, 2001.

Presiding Judge, 194th Judicial District Ct.

F00-02424-M



THE STATE OF TEXAS

IN THE 194TH

V.

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

**STATE'S RESPONSE TO DEFENDANT'S
SECOND SPECIFIC MOTION FOR DISCOVERY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this its Response to Defendant's Second Specific Motion for Discovery and respectfully shows:

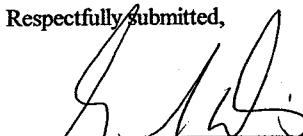
I.

1. No videotape was made of the crime scene.
2. All reports generated by the Edgewood Police are attached hereto.
3. All physical evidence reflecting any and all attempts to interview or actual interviews of Defendant have previously been provided to counsel for Defendant.
4. The State is not in possession of any videotape of Defendant and Zachary Mamot allegedly riding mopeds (gopeds?) in Huffines Park in Richardson.
5. All signed waivers, signed statements, notes, memoranda or reports reflecting that warnings were given to Defendant had previously been provided to counsel for Defendant.
6. All items collected in this case are available for inspection by counsel for Defendant..
7. The State is not in possession of any affidavits from Christy Baugh, Paul Previtt or

- Treshod Tarrant.
8. The affidavits of Ashley Thorp (Johnson?), Tonya Thorp, Zachary Momot and Ryan Hammond have been tendered to counsel for Defendant on May 25, 2001.
 9. The State has no additional information regarding "Lisa, telephone number 903-567-4133" in Van Zandt County police report.
 10. All reports generated by the Edgewood Police are attached hereto.
 11. All notes, whip-out books, reports and memoranda have previously been tendered to counsel for Defendant..
 12. The total number of times any member of a police agency attempted to speak with Defendant while in custody are reflected in the reports previously tendered to counsel for Defendant.
 13. Any "crimestoppers" information regarding the events of this case is reflected in the reports previously tendered to counsel for Defendant.
 14. The State has no information tying "suspects McClesky and Warren" to the robbery that occurred in Wichita Falls on or about August 27, 1997.
 15. The State has no "crimestoppers" information regarding the kidnaping of Sherryll Wilhelm..
 16. No interview of any person incarcerated in the Dallas County Jail has revealed any Brady material. Therefore, this information remains the privileged work product of the State.
 17. All names and addresses of any person interviewed by the State or its agents who was told by the Defendant that he accidentally caused the death of Bertie Lee Cunningham are reflected in the reports and documents previously tendered to counsel for Defendant.
 18. All names and addresses of any person interviewed by the State or its agents who was told by the Defendant that he was intoxicated at the time of the offense are reflected in the reports and documents previously tendered to counsel for Defendant
 19. All names and addresses of any person who told the State or its agents that Defendant was remorseful or sad about the death of the victim, or was remorseful or sad at the time surrounding the death of the victim are reflected in the reports and documents previously tendered to counsel for Defendant.

20. All names and addresses of any person who has told the State or its agents that Defendant seemed suicidal on the days preceding or the day of October 4, 2000, are reflected in the reports and documents previously tendered to counsel for Defendant.
21. No person has told the State or its agents that Defendant or any of his siblings, birth or adopted, were physically, sexually, or emotionally abused at any point in their lives.
22. No interview of any person incarcerated by the State of Texas or its agents in any capacity, or on probation or parole supervised by the State of Texas has revealed any Brady material. Therefore, this information remains the privileged work product of the State.
23. Federal law prohibits the disclosure of the NCIC and TCIC reports.
24. All reports from the sexual assault examination kit taken from the victim have been tendered to counsel for Defendant on May 25, 2001.
25. No person has determined that Treshod Tarrant is not credible or not believable.
26. The criminal history of Treshod Tarrant of which the State is aware is attached hereto. Federal law prohibits the State from disclosing Treshod Tarrant's NCIC and TCIC records.
27. There is no videotape, audiotape or closed circuit television equipment available for use by the Garland Police Department in its interrogation rooms, and the interrogation of Defendant was not videotaped, audiotaped or observed by closed circuit television.

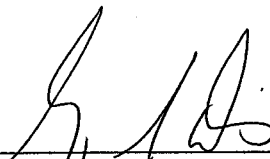
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 29th day of May, 2001.



GREGORY S. DAVIS

PublicData.Com [Texas Criminal [alias] Detail]

http://www4.publicdata.com.au/cgi-bin/pd....&dlnumber=005579828&dlstate=TX&id=886481:

PUBLICDATA.com

►Texas Criminal [alias] Detail

| | | | | | | |
|--|----------|---------------|---------------|---------------|---------------|----------------------------------|
| Name TARRANT,SHOD MONTRELL | | | | | | Sid number 04570472 |
| Race Black | Sex M | Eyes Brown | Hair Black | Height 509 | Weight 280 | Birth Date Jan 16 1974 |
| Alias Names TARRANT,SHOD TARRANT,SHAD M TARRANT,TRESHOD MONTRELL TARRANT,SHOD MOTRELL TARRANT,TRESHOD | | | | | | Alias Date of Births 19741106 |

| | | | | |
|---|---|---|---------------------------------|--|
| Cause number | Court offense literal ARSON | General offense character for court offense none found | | |
| Court disposition date 19921208 | Final plea to offense | Level and degree of offense Uncoded | | |
| Agency | State | County none found | | |
| Court offense number 20000000 | Offense ARSON-(FREE TEXT) | | | |
| Citation | Statute | Active YYYYMMDD | Modified UNKNW | |
| Level and degree of offense Uncoded | | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | | |
| Date of sentence | | Court sentence suspended - time | Court sentence suspended - fine | |
| Court confinement 30D | | Court probation 5Y | Court fine | |
| Court cost | | Court provision literal SPLIT SENTENCE | | |
| Court provision numeric 338 | Definition THE MONETARY AMOUNT TO BE PAID IS A COMBINATION OF FINE AND COURT COSTS. | | | |
| Date case appealed | Disposition during appeal | Definition none found | | |
| Final disposition on appeal case Uncoded | | Multiple sentence Single sentence | | |
| Agency | State | County | | |

PublicData.Com [Texas Criminal [alias] Detail]

<http://www4.publicdata.com.ai/cgi-win/pd....&dlnumber=005579828&distate=TX&id=8864816>

none found

| | | | |
|---|---|---|-------------------|
| Cause number | Court offense literal BURGLARY OF BUILDING | General offense character for court offense none found | |
| Court disposition date 19921208 | Final plea to offense | Level and degree of offense Uncoded | |
| Agency | State | County none found | |
| Court offense number 22000000 | Offense BURGL-(FREE TEXT) | | |
| Citation | Statute | Active YYYYMMDD | Modified UNKNW |
| Level and degree of offense Uncoded | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | |
| Date of sentence | Court sentence suspended - time | Court sentence suspended - fine | |
| Court confinement 30D | Court probation 5Y | Court fine 1500 | |
| Court cost | Court provision literal SPLIT SENTENCE | | |
| Court provision numeric 347 | Definition SUBJECT MUST PAY RESTITUTION AND COURT COSTS. | | |
| Date case appealed | Disposition during appeal | Definition none found | |
| Final disposition on appeal case Uncoded | Multiple sentence Single sentence | | |
| Agency | State | County none found | |

00029

11/13/2000 2:20 PM

PublicData.Com [Texas Criminal [alias] Detail]

<http://www4.publicdata.com.au/cgi-wuwpd....&dnumber=005579828&dstate=TX&id=88643.1>

| | | | |
|---|---|---|-------------------|
| Cause number 931379 | Court offense literal | General offense character for court offense none found | |
| Court disposition date 19960920 | Final plea to offense G | Level and degree of offense Misdemeanor - Class B | |
| Agency KAUFMAN CO CRT AT LAW | State TX | County KAUFMAN | |
| Court offense number 23000018 | Offense THEFT >= \$20 BUT < \$200 | | |
| Citation 31.03(a) | Statute PC | Active YYYYMMDD | Modified UNKNW |
| Level and degree of offense Uncoded | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | |
| Date of sentence 19960920 | Court sentence suspended - time | Court sentence suspended - fine | |
| Court confinement | Court probation | Court fine | |
| Court cost 175 | Court provision literal 5D JAIL - SERVED | | |
| Court provision numeric | Definition none found | | |
| Date case appealed | Disposition during appeal | Definition none found | |
| Final disposition on appeal case Uncoded | Multiple sentence Single sentence | | |
| Agency | State | County none found | |

00030

PAGE NO 1 PAGES

NO 987144

CLASSIFICATION

DATE OF REPORT

00031

05/23/2001 10:45 9038967377

EDGWOOD POLICE DEPT

PAGE 83

SUPPLEMENTARY INVESTIGATION REPORT

PAGE NO 1 of 2

| | | |
|---|-------------------|--------------------------|
| NO. 00-0144 | Agency Assist | NO. 00-0144 |
| Name of Complainant | | |
| State of Texas/Edgewood Police Dept./Van Zandt Co. Sheriffs Dept./ Garland PD | | |
| Name | | |
| Agency Assist | Case Assigned To: | J. A. Bonham Badge # 303 |

DETAILS OF OFFENSE, PROGRESS OF INVESTIGATION, ETC.

Date 10-6-00

On October 6, 2000 at approximately 2:00 am, I was on my way home from Dallas working an off duty job. As I entered Edgewood I noticed Joey Branch of the Van Zandt Sheriffs Department along with Wills Point Officer Raymond Keener parked at the Dairy Queen. I asked what was going on, Deputy Branch advised that Garland Police Department had a homicide working, and that the suspect, a Jim Murphy (a class mate of mine) was at Shod Tarrant's house. I was asked if I knew the area. I said yes, very well. I was then advised that the victim was an 80 year old women and that her location was not known.

I was then asked to draw a diagram of the house and the surrounding area of the house. I advised Chief Deputy Gary Rose then and there of the best route for officers to safely approach the rear of the house. Gary then asked me if I would guide the officers so they wouldn't be detected going through the brush. I then guide the Officers to the rear of the house. Gary Rose, along with Sheriff's Office personnel made contact and entry to the home located at 509 Lamar.

Gary advised me that Murphy was lying to him and asked me if I would talk to him to possibly get the location of the victim. I did so and was advised by Murphy the body was in a creek on Livingston Road. Sheriff's Office personnel was unsure of the location and asked if I would show them. I did so.

While at the location Deputy Branch asked if I would stay at the scene with him while Gary met with Garland Police Department investigators already in Edgewood and brought them to the scene. We were without car or radio at this time securing the scene for Garland Officers.

About 30 minutes later, Deputy Deane of Van Zandt County Sheriffs Office arrived and told me to get in. I was advised that Garland Officers or Van Zandt County Sheriffs Office personnel had Judge Wilcoxson JPJ at the Police Department and was asked if they could use the office to arraign Murphy.

Arriving at the Police Department we entered. I then called the Sheriffs Department and asked if Chief Knox had been notified. Dispatch advised a message had been left on the answering machine. I then notified SGT. Fipps by phone as to what was going on.

J.A. Bonham, Badge #303

27 INVESTIGATING OFFICER'S NAME: J.A. Bonham, Badge #303

28 REPORT MADE BY: J.A. Bonham, Badge #303

DATE: 10/06/00

29 CASE FILED: [X] YES [] NO

30 THIS CASE IS: [X] CLEARED BY ARREST [] UNFOUNDED [] INACTIVE [] OTHER []

31 APPROVED BY: [Signature]

BADGE #: 302

Yes [] No [X] Cleared by arrest [X] Unfounded [] Inactive [] Other []

Form No. 130

ORDER FROM

LAW ENFORCEMENT SYSTEMS, INC. • P.O. BOX 1825, CORPUS CHRISTI, TEXAS 78401-1825

00032

FILED
F00-02424-M AND FOO-23910-M
MAY 12 2010
CLERK OF DISTRICT COURT
DALLAS COUNTY, TEXAS
THE STATE OF TEXAS § IN THE 194TH JUDICIAL
V. §
JEDIDIAH ISAAC MURPHY § DISTRICT COURT OF
§ DALLAS COUNTY, TEXAS
§

THIRD MOTION FOR DISCOVERY OF SPECIFIC ITEMS

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW the Defendant, in the above titled and numbered cause, by and through his attorney of record, and makes this his Motion for Discovery of Specific Items, and in support of said motion would show the following:

I.

Defendant requests that the following items be supplied to defense counsel, copies of items supplied to defense counsel, or defense counsel be allowed to examine such items outside the presence of the State:

1. On two previous occasions, Defendant has requested access to complainant's vehicle for inspection by counsel and Defendant's Trace Evidence Expert. On Thursday, May 17, counsel for the State orally notified Defendant's counsel that the vehicle had been returned to the complainant's family and that vehicle had subsequently been sold to an unknown party. Due to the inability of Defendant to adequately investigate the vehicle, he requests the following items: any pictures of the trunk, the passenger compartment, the exterior, or other part of Complainant's vehicle; any reports, notes or memoranda regarding the evidence found in the

vehicle; any reports, notes or memoranda regarding scientific tests performed on any evidence found in Complainant's vehicle; any reports, notes or memoranda regarding any conclusions made regarding any evidence found in Complainant's vehicle;

2. The ownership of the blue shirt found in the creek;
3. The ownership of the duffel bag found in the creek;
4. Any reports, notes, or memoranda regarding the "brownish stain" on the back seat of Complainant's vehicle; any scientific tests run on such stain; any reports, notes, or memoranda regarding any conclusions made as to the origin of the "brownish stain";

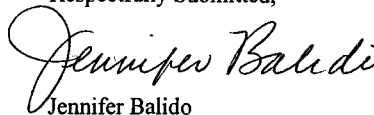
II.

Defendant would show that each of the above mentioned items are in the exclusive control of the State and not available to the Defendant through any investigatory tool. Additionally, these items may lead to relevant evidence for the Defense that cannot be found without viewing these items. Further, the denial of this Motion would deny the Defendant: the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure; the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 15 of the Texas Constitution, and Articles 1.05 and 36.29 of the Texas Code of Criminal Procedure; and Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution and Due Course of Law under Article I, Section 19 of the Texas Constitution, and

Article 1.04 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grants his Motion in all things.

Respectfully Submitted,

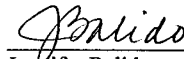


Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the above motion to Greg Davis, Assistant District Attorney of Dallas County, Texas on the same day of filing therewith.


Jennifer Balido

ORDER

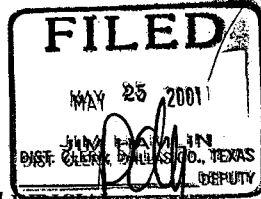
Having considered the foregoing motion and arguments of counsel, if any, the Motion is hereby _____ (Granted/ Denied)

This the _____ day of _____, 2001.

Judge Presiding

00035

F00-02424-M



THE STATE OF TEXAS

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IN THE 194TH JUDICIAL

V.

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

**STATE'S RESPONSE TO DEFENDANT'S
THIRD MOTION FOR DISCOVERY OF SPECIFIC ITEMS**

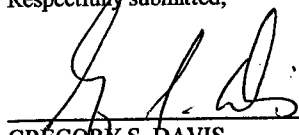
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this its Response to Defendant's Third Motion for Discovery of Specific Items and respectfully shows:

I.

1. Counsel for Defendant have previously examined all photos of the trunk, passenger compartment, exterior or other part of Complainant's vehicle. The State has previously tendered to Counsel for Defendant all reports, notes or memoranda regarding any evidence found in the vehicle, scientific tests performed on the evidence and conclusions made regarding the evidence.
2. The State has no additional information regarding the ownership of the blue shirt found in the creek.
3. The State has no additional information regarding the ownership of the duffel bag found in the creek.
4. The State has previously tendered to counsel for Defendant all reports, notes or memoranda regarding the "brownish stain".

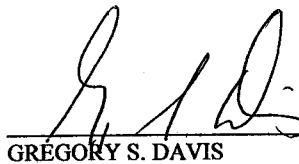
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 25th day of May, 2001.


GREGORY S. DAVIS

Y.

JEDIDIAH ISAAC MURPHY

IN THE 194TH JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY TEXAS

DEFENDANT'S FOURTH MOTION FOR DISCOVERY

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW the Defendant, in the above entitled and numbered cause and presents in and to this Court this his Fourth Motion for Discovery, and in support of such motion, would show this Court the following:

I.

Sometime during the weeks preceding the filing of this motion, the Dallas Sheriff's Department entered the cell or tank of Defendant and removed all personal items from the cell or tank. Such items included pictures, drawings, letters to family, and, most importantly, *notes or memoranda prepared by Defendant at the request of his defense counsel of record*. Defendant would ask for an inventory of the items taken, notice of the reason such items were taken, and return of the items as soon as practicable. Moreover, Defendant would object to the taking of the notes and memoranda prepared by Defendant at the request of his defense counsel of record as violation of attorney/client privilege, and would ask this court to suppress any use of this information at the trial of his case.

II.

Defendant would also request that he be given a clear audible copy of the videotape taken

at Chacho's convenience store, or any other videotape the State intends to introduce into evidence at his trial. The State has given a copy of the Chacho's videotape to defense counsel upon previous request; however, the tape is not audible and does not run at a normal speed. The defense has reason to believe that the State has procured a clear audible copy from a video lab, but has yet to tender such tape to Defendant.

III..

Defendant asserts that these items are in the exclusive possession of the State, and that such items are not available by any other investigatory tool. Additionally, these items may lead to relevant evidence for the Defense that cannot be found without viewing these items. Further, the denial of this Motion would deny the Defendant: the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure; the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 15 of the Texas Constitution, and Articles 1.05 and 36.29 of the Texas Code of Criminal Procedure; and Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution and Due Course of Law under Article I, Section 19 of the Texas Constitution, and Article 1.04 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grants his Motion in all things.

Respectfully Submitted,

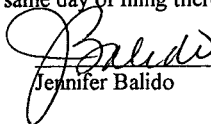


Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the above motion to Greg Davis, Assistant District Attorney of Dallas County, Texas on the same day of filing therewith.


Jennifer Balido

ORDER

Having considered the foregoing motion and arguments of counsel, if any, the Motion is hereby _____ (Granted/ Denied)

This the 4 day of June, 2001.


Judge Presiding

F00-024240-M AND F00-29310-M

THE STATE OF TEXAS

v.

JEDIDIAH ISAAC MURPHY

2010 JUN 27 IN THE 194TH JUDICIAL

§ JIM H. M. LIN
§ DISTRICT COURT OF
§ DALLAS COUNTY, TEXAS
§

DEFENDANT'S FIFTH MOTION FOR DISCOVERY

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW the Defendant, in the above entitled and numbered cause and presents in and to this Court this his Fifth Motion for Discovery, and in support of such motion, would show this Court the following:

The full legal name and date of birth of State's witness Mandy Kirl (or Kurl).

Respectfully Submitted,



Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the above motion to Greg Davis, Assistant District Attorney of Dallas County, Texas on the same day of filing therewith.


Jennifer Balido

00041

ORDER

Having considered the foregoing motion and arguments of counsel, if any, the Motion is
hereby _____ (Granted/ Denied)

This the _____ day of _____, 2001.

Judge Presiding

F00-02424-M

FILED

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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APR 22 PM 1:41
IN THE 194TH JUDICIAL
DISTRICT COURT OF
DEPUTY
DALLAS COUNTY, TEXAS

SPECIFIC MOTION PURSUANT TO *BRADY V. MARYLAND*

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW THE DEFENDANT, by and through his counsel of record, and makes this, his Specific Motion Pursuant to *Brady v. Maryland*, and in support of this motion would show the following:

I.

A. Prosecutor's Duty to Disclose

Under *Brady v. Maryland*, a prosecutor has an affirmative duty to turn over material, exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963); *McFarland v. State*, 928 S.W. 2d 482, 511 (Tex. Crim. App. 1996); *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993). Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 291 (1973), or in the Compulsory Process or Confrontation clauses of the sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 1479, 1485, 104 S.Ct. 2528, 2532, 81 L.Ed. 2d 413 (1984); *cf. Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed. 2d 674 (1974) ("The Constitution guarantees a fair

00043

trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.”). No new ground is broken in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 2d 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State, for example were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to defendant’s claim of innocence. In the absence of any valid state justification, exclusion of **ANY TYPE** of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and “survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed. 2d 657 (1984). *See also Washington v. Texas*, supra, at 22-23, 87 S.Ct. At 1924-1925; *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S.Ct. 2142, 2146-2147, 90 L.Ed. 2d 636 (1986); *U.S. v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed. 2d 413 (1988). *Brady* includes disclosure of any favorable information in the possession of police agencies or other parts of the “prosecutorial team.” *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed. 2d 490, 508 (1995). Knowledge of governmental agents of exculpatory evidence is imputed to the prosecution. *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991); *U.S. v. Auten*, 632 F.2d 478 (5th Cir. 1980).

The State has an affirmative duty to turn over evidence in its possession **or available to it** that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963); *McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996). The Supreme Court has held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49

L.Ed. 2d 342 (1976).

In the present case, defense has filed a general *Brady* Motion and served the Dallas County District Attorney's Office with a copy of such motion. See Court Jacket of F00-02424-M, styled *The State of Texas v. Jedidiah Isaac Murphy*. Although the State has allowed the Defendant's attorneys access to the exhibits it intends to offer at trial, as of the date of the filing of this motion, the State has not tendered to defense counsel any formal document giving notice of any exculpatory or mitigating evidence.

Defendant asserts that the information requested by this motion is not fully available to the defendant nor could it be obtained through reasonable diligence, and thus subject to *Blackmon v. Scott*, 22 F.2d 560 (5th Cir. 1994)(*cert. denied*, 115 S.Ct. 671, 513 U.S. 1060, 130 L.Ed. 2d 604).

B. Evidence is Favorable to Accused

Favorable evidence is any evidence that, if disclosed and used effectively, may make the difference between conviction and acquittal. It includes both exculpatory and impeachment evidence. *Wyatt v. State*, 23 S.W.3d 18 (Tex. Crim. App. 2000); *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992); *U.S. v. Bagley*, 483 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985). Exculpatory evidence is testimony or other evidence that tends to justify, excuse, or clear the defendant from guilt; impeachment evidence is that offered to disparage, deny or contradict. *Welch v. State*, 2000 WL 661047, No Publication, (Tex. App.—Texarkana, May 23, 2000)(No. 06-99-00106-CR). Evidence can be favorable to the accused either on guilt or on punishment. *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. 1194. Impeachment evidence is favorable even if cumulative. *Smith*, 904 F.2d at 964-69.

In *Bagley*, *supra*, the U.S. Supreme Court expressed concern with "any adverse effect that

the prosecutor's failure to respond (with exculpatory evidence) might have had on the preparation of the defendant's case." 473 U.S. 683, 105 S.Ct. at 3384.

C. Materiality

The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions; rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 119 S.Ct. at 1952 (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555).

II.

Defendant stands charged with Capital Murder. The State of Texas has given notice that it intends to seek the death penalty if Defendant is found guilty as charged in the indictment. Defendant hereby formally requests, pursuant to the prosecutor's duty to turn over exculpatory, impeachment or mitigating evidence, that the State of Texas, by and through the Dallas County District Attorney's Office turn over to Defendant the following information:

1. The reason Officers Franey and Mendoza of the Garland Police Department, Peavy of the Terrell Police Department, and Vanek of the Edgewood Police Department are not listed on the witness list and therefore the State does not intend to call those Officers to testify at trial;
2. Items given by Defendant to Phillip Cruz to give to Defendant's daughter on or about October 6, 2000;
3. The Affidavits of Christy Baugh, Paul Previtt, and Treshod Tarrant;

4. The Affidavits of Ashley Thorpe and Tonya Thorpe, Zachary Mamot and Ryan Hammond;
5. Any information regarding "Lisa, telephone number 903-567-4133" in Van Zandt County police report;
6. Any police report generated by any member of the Edgewood Police Department.
7. Any handwritten or typewritten notes, whip-out books, "Dear Chief" letters, reports or other memorandum generated by any one of the officers that constituted the arrest team of Defendant, including, but not limited to Rose, Goodson, D. Pool, R. Pool, Godley and DeCoux of the Van Zandt County Sheriff's Office and Heath Burton (civilian) of the Van Zandt County Sheriff's Office; Strange of the Delta County Sheriff's Office; Keener of the Wills Point Police Department; Bonham of the Edgewood Police Department; Lay, Myers, and Tooke of the Garland Police Department; Peavy of the Terrell Police Department;
8. The total number of times any member of a police agency attempted to speak to Defendant while in custody, regardless of whether counsel had been appointed or whether counsel had communicated with Defendant;
9. Any "crimestoppers" information from Dallas, Kaufman, of Van Zandt counties regarding the events of this case;
10. Any information, including entire criminal history, *modus operandi*, and any other information tying suspects McClesky and Warren to the purse-snatching or robbery that occurred on or about August 27, 1997 in Wichita Falls, Texas and involved the vehicle stolen earlier from Sherryl Wilhelm in Arlington, Texas;
11. Any "crimestoppers" information regarding the alleged kidnapping of Sheryl

Wilhelm in Arlington, Texas on or about August 26, 1997;

12. The names and locations of interviews of any person incarcerated in the Dallas County Jail and interviewed by the State or its agents, in which the subject of the interview stated that Jedidiah Murphy told him that he ACCIDENTALLY caused the death of Bertie Lee Cunningham; that he was INTOXICATED at the time of the offense; or any statement or other information from such interviews that are relevant to Special Issue # 1 (the lack of future dangerousness) or Special Issue # 2 (sufficient mitigating circumstances to warrant a life sentence);
13. The name and address of any person interviewed by the State or its agents who was told by the Defendant that he ACCIDENTALLY caused the death of Bertie Lee Cunningham;
14. The name and address of any person interviewed by the State or its agents who was told by the Defendant that he was INTOXICATED at the time of the offense.
15. The name and address of any person who has told the State or its agents that Defendant was REMORSEFUL OR SAD about the death of the victim, Bertie Cunningham; or was REMORSEFUL OR SAD at the time surrounding the death of Bertie Cunningham;
16. The name and address of any person who has told the State or its agents the Defendant seemed suicidal on the days preceding or the day of October 4, 2000.
17. The name and address of any person who has told the State or its agents that Defendant or any of his siblings, birth or adopted, were physically, sexually, or emotionally abused at any point in their lives;
18. Any attempt made, successful or unsuccessful, to talk to any person incarcerated

by the State of Texas or its agents in any capacity, or on probation or parole supervised by the State of Texas or its agents, in regard to this case;

19. The criminal history contained in TCIC or NCIC of any witness the State has interviewed (including police officers or other government agents), whether or not the State intends to call them as witnesses in their case;
20. Any and all reports from the sexual assault examination kit taken from the victim, Bertie Cunningham, including any conclusions drawn from the results of such examination.
21. The name and address of any person employed by any police agency in this or any county, or the District or County Attorney's office in this or any county, or any person employed by the Texas Board of Pardons and Paroles who has evaluated the credibility and believability of Treshod Tarrant, and had determined that he is not credible or not believable.
22. The criminal record of Treshod Tarrant, including, but not limited to, TCIC and NCIC, any alleged involvement of criminal activity, or any allegation that he was engaged in, either alone or as a party, any criminal activity, any crime in which he was a suspect, and any recommendations or evaluations made by any employee of the Texas Board of Pardons and Paroles in regard to his current parole status;
23. Any videotape, audiotape or closed circuit television equipment available for use by the Garland Police Department in its interrogation rooms, whether or not used in this case, and a copy of the videotape or audiotape of the interrogation of Defendant, if one exists, or the names or addresses of those people who observed the interrogation of Defendant by closed circuit television, if they did; or the names

and addresses of any one who observed the interrogation of Defendant but was not in the same room as defendant, and any reports made or notes taken of such observation;

24. The internal procedures of the Garland Police Department in regard to the interrogation of suspects and the taking of a voluntary statement;
25. The internal procedures of the Arlington Police Department in regard to the creation of a composite drawing used in the investigation of a criminal offense.

III.

Defendant asserts that the above information is either exculpatory, mitigating, or impeaching evidence of the State's case at the guilt/innocence portion or the punishment stage of the trial. Additionally, Defendant asserts that this information is in the possession of the State of Texas, represented by the Dallas County District Attorney's Office, or any police agency involved in the investigation of this case. Defendant asserts, moreover, that this information is not available to Defendant through other means regardless of the diligence of his investigation of this case and preparation for trial.

IV.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that this motion be granted in all things, and that the State of Texas dutifully turn over each and every piece of exculpatory, mitigating, or impeaching evidence, whether listed in this motion or not.

Respectfully Submitted,



Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214)653-3550
SBN 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I served by my own hand a copy of the foregoing motion on the
Dallas County District Attorney's Office on the 22 day of May, 2001.


Jennifer Balido

ORDER

Having considered the foregoing motion, relevant case law and arguments of counsel,
that motion is hereby _____.

This the _____ of _____, 2001.

Presiding Judge, 194th Judicial District Ct.

F00-02424-M

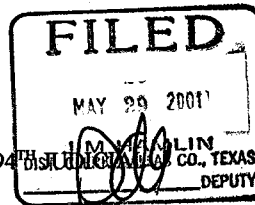
THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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§
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§

IN THE 19TH DISTRICT COURT OF
DALLAS COUNTY, TEXAS



**STATE'S RESPONSE TO DEFENDANT'S
SPECIFIC MOTION PURSUANT TO *BRADY V. MARYLAND***

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this its Response to Defendant's Specific Motion Pursuant to *Brady v. Maryland* and respectfully shows:

I.

The State has previously disclosed to counsel for Defendant any and all *Brady* material.

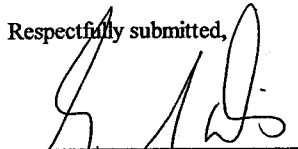
II.

1. The State's reason for calling or not calling a potential witness is the privileged work product of the State.
2. All items collected in this case are available for inspection by counsel for Defendant.
3. The State is not in possession of any affidavits from Christy Baugh, Paul Previtt or Treshod Tarrant.
4. The affidavits of Ashley Thorp (Johnson?), Tonya Thorp, Zachary Momot and Ryan Hammond have been tendered to counsel for Defendant on May 25, 2001.
5. The State has no additional information regarding "Lisa, telephone number 903-567-4133" in Van Zandt County police report.

6. All reports generated by the Edgewood Police are attached hereto.
7. All notes, whip-out books, letters reports and memoranda were previously tendered to counsel for Defendant.
8. The total number of times any member of a police agency attempted to speak with Defendant while in custody are reflected in the reports previously tendered to counsel for Defendant.
9. Any "crimestoppers" information regarding the events of this case is reflected in the reports previously tendered to counsel for Defendant.
10. The State has no information tying "suspects McClesky and Warren" to the robbery that occurred in Wichita Falls on or about August 27, 1997.
11. The State has no "crimestoppers" information regarding the kidnaping of Sherryl Wilhelm.. Affidavit.
12. All names and addresses of any person interviewed by the State or its agents who was told by the Defendant that he accidentally caused the death of Bertie Lee Cunningham or that he was intoxicated at the time of the offense are reflected in the reports and documents previously tendered to counsel for Defendant.
13. All names and addresses of any person interviewed by the State or its agents who was told by the Defendant that he accidentally caused the death of Bertie Lee Cunningham are reflected in the reports and documents previously tendered to counsel for Defendant.
14. All names and addresses of any person interviewed by the State or its agents who was told by the Defendant that he was intoxicated at the time of the offense are reflected in the reports and documents previously tendered to counsel for Defendant.
15. All names and addresses of any person who told the State or its agents that Defendant was remorseful or sad about the death of the victim, or was remorseful or sad at the time surrounding the death of the victim are reflected in the reports and documents previously tendered to counsel for Defendant.
16. All names and addresses of any person who has told the State or its agents that Defendant seemed suicidal on the days preceding or the day of October 4, 2000, are reflected in the reports and documents previously tendered to counsel for Defendant.

17. No person has told the State or its agents that Defendant or any of his siblings, birth or adopted, were physically, sexually, or emotionally abused at any point in their lives.
18. No interview of any person incarcerated by the State of Texas or its agents in any capacity, or on probation or parole supervised by the State of Texas has revealed any Brady material. Therefore, this information remains the privileged work product of the State.
19. Federal law prohibits the State from disclosing the requested NCIC and TCIC records.
20. All reports from the sexual assault examination kit taken from the victim have been tendered to counsel for Defendant on May 25, 2001.
21. No person has determined that Treshod Tarrant is not credible or not believable.
22. The criminal history of Treshod Tarrant of which the State is aware has been tendered to counsel for Defendant. Federal law prohibits the State from disclosing Treshod Tarrant's NCIC and TCIC records.
23. There is no videotape, audiotape or closed circuit television equipment available for use by the Garland Police Department in its interrogation rooms, and the interrogation of Defendant was not videotaped, audiotaped or observed by closed circuit television.

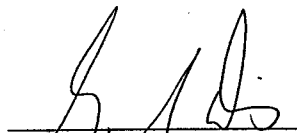
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 29th day of May, 2001.



GREGORY S. DAVIS

PublicData.Com [Texas Criminal [alias] Detail]

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PUBLICDATA.com

►Texas Criminal [alias] Detail

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|---|-----------------|----------------------|----------------------|----------------------|----------------------|---|
| Name TARRANT,SHOD MONTRELL | | | | | | Sid number 04570472 |
| Race Black | Sex M | Eyes Brown | Hair Black | Height 509 | Weight 280 | Birth Date Jan 16 1974 |
| Alias Names TARRANT,SHOD TARRANT,SHAD M TARRANT,TRESHOD MONTRELL TARRANT,SHOD MOTRELL TARRANT,TRESHOD | | | | | | Alias Date of Births 19741106 |

| | | | | |
|---|---|---|--|--|
| Cause number | Court offense literal ARSON | | General offense character for court offense Uncoded | |
| Court disposition date 19921208 | Final plea to offense | | Level and degree of offense Uncoded | |
| Agency | State | | County none found | |
| Court offense number 20000000 | Offense ARSON-(FREE TEXT) | | | |
| Citation | Statute | Active YYYYMMDD | Modified UNKNW | |
| Level and degree of offense Uncoded | | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | | |
| Date of sentence | | Court sentence suspended - time | Court sentence suspended - fine | |
| Court confinement 30D | | Court probation 5Y | Court fine | |
| Court cost | | Court provision literal SPLIT SENTENCE | | |
| Court provision numeric 338 | Definition THE MONETARY AMOUNT TO BE PAID IS A COMBINATION OF FINE AND COURT COSTS. | | | |
| Date case appealed | Disposition during appeal | Definition none found | | |
| Final disposition on appeal case Uncoded | | Multiple sentence Single sentence | | |
| Agency | State | County | | |

PublicData.Com [Texas Criminal [alias] Detail]

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none found

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|---|---|--|-------------------|
| Cause number | Court offense literal BURGLARY OF BUILDING | General offense character for court offense Uncoded | |
| Court disposition date 19921208 | Final plea to offense | Level and degree of offense Uncoded | |
| Agency | State | County none found | |
| Court offense number 22000000 | Offense BURGL-(FREE TEXT) | | |
| Citation | Statute | Active YYYYMMDD | Modified UNKNW |
| Level and degree of offense Uncoded | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | |
| Date of sentence | Court sentence suspended - time | Court sentence suspended - fine | |
| Court confinement 30D | Court probation 5Y | Court fine 1500 | |
| Court cost | Court provision literal SPLIT SENTENCE | | |
| Court provision numeric 347 | Definition SUBJECT MUST PAY RESTITUTION AND COURT COSTS. | | |
| Date case appealed | Disposition during appeal | Definition none found | |
| Final disposition on appeal case Uncoded | Multiple sentence Single sentence | | |
| Agency | State | County none found | |

PublicData.Com | Texas Criminal [alias] Detail |

<http://www4.publicdata.com.au/cgi-win/pd....dlnumber=0055/9828&dstate=TX&id=1/699840>

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|--|--|---|---|--|
| Cause number 931379 | Court offense literal | | General offense character for court offense Uncoded | |
| Court disposition date 19960920 | Final plea to offense G | Level and degree of offense Misdemeanor - Class B | | |
| Agency KAUFMAN CO CRT AT LAW | State TX | County KAUFMAN | | |
| Court offense number 23000018 | Offense THEFT >= \$20 BUT < \$200 | | | |
| Citation 31.03(a) | Statute PC | Active YYYYMMDD | Modified UNKNW | |
| Level and degree of offense Uncoded | | Statute citation for offense | | |
| Court disposition number 310 | Definition SUBJECT HAS BEEN FOUND GUILTY OF A CRIMINAL CHARGE, EITHER UPON A CRIMINAL TRIAL, A PLEA OF GUILTY, OR A PLEA OF NOLO CONTENDERE. | | | |
| Date of sentence 19960920 | Court sentence suspended - time | Court sentence suspended - fine | | |
| Court confinement | Court probation | Court fine | | |
| Court cost 175 | Court provision literal 5D JAIL - SERVED | | | |
| Court provision numeric | Definition none found | | | |
| Date case appealed | Disposition during appeal | Definition none found | | |
| Final disposition on appeal case Uncoded | | Multiple sentence Single sentence | | |
| Agency | State | County none found | | |

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NO. 10-5164

CLASSIFICATION

DATE OF REPORT

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EDGWOOD POLICE DEPT

PAGE 03

SUPPLEMENTARY INVESTIGATION REPORT

PAGE NO 1 of 2

NO. 00-0144

Agency Assist

NO. 00-0144

| | | |
|--|--------------------------|-----------|
| Name of Complainant | Address | Phone No. |
| State of Texas/Edgewood Police Dept./Van Zandt Co. Sheriff's Dept./ Garland PD | | |
| Officer | Case Assigned To | |
| Agency Assist | J. A. Bonham Badge # 303 | |

DETAILS OF OFFENSE, PROGRESS OF INVESTIGATION, ETC.

Date 10-6-00

On October 6, 2000 at approximately 2:00 am, I was on my way home from Dallas working an off duty job. As I entered Edgewood I noticed Joey Branch of the Van Zandt Sheriff's Department along with Wills Point Officer Raymond Keener parked at the Dairy Queen. I asked what was going on, Deputy Branch advised that Garland Police Department had a homicide working, and that the suspect, a Jim Murphy (a class mate of mine) was at Shod Tarrant's house. I was asked if I knew the area. I said yes, very well. I was then advised that the victim was an 80 year old woman and that her location was not known.

I was then asked to draw a diagram of the house and the surrounding area of the house. I advised Chief Deputy Gary Rose then and there of the best route for officers to safely approach the rear of the house. Gary then asked me if I would guide the officers so they wouldn't be detected going through the brush. I then guide the Officers to the rear of the house. Gary Rose, along with Sheriff's Office personnel made contact and entry to the home located at 509 Lamar.

Gary advised me that Murphy was lying to him and asked me if I would talk to him to possibly get the location of the victim. I did so and was advised by Murphy the body was in a creek on Livingston Road. Sheriff's Office personnel was unsure of the location and asked if I would show them. I did so.

While at the location Deputy Branch asked if I would stay at the scene with him while Gary met with Garland Police Department investigators already in Edgewood and brought them to the scene. We were without car or radio at this time securing the scene for Garland Officers.

About 30 minutes later, Deputy Desue of Van Zandt County Sheriff's Office arrived and told me to get in. I was advised that Garland Officers or Van Zandt County Sheriff's Office personnel had Judge Wilcoxson JP3 at the Police Department and was asked if they could use the office to arraign Murphy.

Arriving at the Police Department we entered. I then called the Sheriff's Department and asked if Chief Knox had been notified. Dispatch advised a message had been left on the answering machine. I then notified SGT. Fipps by phone as to what was going on.

| | | | |
|---|-----------------|----------------|---------------|
| J.A. Bonham, Badge #303 | | REPORT MADE BY | DATE 10/06/00 |
| 20 CASE FILED | 30 THIS CASE IS | 31 APPROVED BY | BADGE # 302 |
| Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Cleared by arrest <input checked="" type="checkbox"/> Unfounded <input type="checkbox"/> Inactive <input type="checkbox"/> Other <input type="checkbox"/> | | | |

Form No. 130

 ORDER FROM
 LAW ENFORCEMENT SYSTEMS, INC. • P.O. BOX 1825, CORPUS CHRISTI, TEXAS 78401-1825

00061

FILED

CAUSE NO. F00-02424-M

THE STATE OF TEXAS

v. JIM PAMILLI
DISTRICT CLERK
DALLAS CO., TEXAS
JEDIDIAH ISAAC MURPHY

§
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§

IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

**DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS OFFENSES
REASONABLY CONTEMPLATED BY THE PROSECUTION TO BE
INTRODUCED AT TRIAL**

THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant in the above entitled and numbered causes, by and through his attorney of record and moves this Honorable Court to order the State of Texas to give the Defendant notice of any extraneous offenses or evidence of other crimes which it reasonably anticipates it may seek to introduce into trial of this cause for the following reasons:

I.

NOTICE

The Defendant, under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas Constitution, is entitled to advance notice of the charges against which he must defend himself. If, in proving those charges, the prosecution reasonably anticipates that it may be using evidence of extraneous offenses or evidence of other crimes not in the charging paper, then the Defendant will have no notice of them unless notice is given at this time. Further, lack of notice will constitute a denial of the Defendant's constitutional right to notice under the United States and Texas Constitutions.

DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS
OFFENSES--Page 1 of 5 pages

00062

DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS
OFFENSES--Page 1 of 5 pages

II.

EFFECTIVE ASSISTANCE OF COUNSEL

Should the State be allowed to introduce evidence of other crimes or extraneous offenses in this cause, then this Honorable Court will charge to the jury, by written instructions, that they may not use evidence of the extraneous offense unless they find the Defendant guilty of those offenses beyond a reasonable doubt. *Ernest v. State*, 308 S.W. 2d 33. The effect of that instruction is to litigate that issue. In order to litigate that issue, the Defendant must be entitled to the effective assistance of counsel in litigating that issue. He must reasonably be given the opportunity to persuade the jury that the Defendant is not guilty of the offense beyond a reasonable doubt. By failing to give the Defendant notice of the extraneous offense, if any, which the State reasonably may introduce in this cause, the State and this Court deprives the Defendant, in addition to notice, of the effective assistance of counsel which is his right under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas Constitution.

III.

THE RIGHT TO PRESENT DEFENSIVE EVIDENCE

It is fundamental under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas Constitution that the Defendant has the right to present defensive evidence. *Chambers v. Mississippi*, 404 U.S. 284 (1973). When the State tries to prove the guilt of that extraneous offense beyond a reasonable doubt, under *Chambers*, the Defendant would be entitled to present defensive evidence in his behalf to show

DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS
OFFENSES--Page 2 of 5 pages

the fact finder that he is not guilty of that offense. In order to gather that defensive evidence, the Defendant must know of that extraneous offense in advance of trial. Deprivation of that notice would make it impossible for him to prepare the varied defensive evidence which is his right under the Texas and United States Constitutions to present.

IV.

CONFRONTATION

Under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas Constitution, the Defendant is entitled to confront and cross-examine his accusers. If the State of Texas chooses to litigate the issue of the extraneous offense, the Defendant must be able, under the Sixth Amendment and its Texas counterpart, to intelligently confront and cross-examine the accusers on that separate charge. If the Defendant is given no notice of that charge, then not only is his right under the Sixth Amendment to notice, his right to effective assistance of counsel, and his fundamental right to present defensive evidence denigrated, his absolute right to confront and cross-examine his accusers is severely undercut by his lack of any opportunity to prepare for such confrontation.

V.

CONTINUANCE TO SECURE RIGHTS

If the Defendant is not given notice of the additional extraneous offenses which the State, in good faith, reasonably believes that it may attempt to litigate at trial, then the Defendant will be forced to move this Honorable Court for a continuance under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 13, and 19 of the Texas

DEFENDANT'S MOTION FOR NOTICE OF EXTRANEIOUS
OFFENSES--Page 3 of 5 pages

Constitution in order to obtain notice of additional charges, securing the effective assistance of counsel in litigating the issue of Defendant's guilt of the additional charges beyond a reasonable doubt, to secure his Sixth Amendment right to present defensive evidence, and to prepare adequately to intelligently cross-examine his accusers of the additional crimes.

VI.

UNNECESSARY TRIAL DELAY

If at trial, in order to secure these rights, the trial court agrees that the Defendant is entitled to a continuance, then the trial will be delayed unnecessarily, a result which can easily be avoided by notice to Defendant at the pre-trial hearing of additional crimes which the prosecution, in good faith, reasonably expects may attempt to prove at trial.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully moves this Honorable Court to grant a continuance of this case until such time as the prosecutor provides the above-referenced information reasonably requested in this cause so that the Defendant will not be "convicted after less than the meticulously fair trial that the Constitution demands." *Gannett Company Inc. v. Depasquale*, ___ U.S. ___, 99 S.Ct. 2898 (1979).

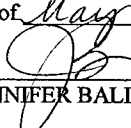
Respectfully submitted,



JENNIFER BALIDO
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
SBN: 10474880

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion has been hand-delivered to the Dallas County District Attorney's Office on this the 31 day of May, 2001.



JENNIFER BALIDO

ORDER

Came to be heard Defendant's Motion for Notice of Extraneous Offenses, and Motion is hereby (GRANTED) (DENIED).

SIGNED this the _____ day of _____, 2001.

JUDGE PRESIDING

FILED

F00-02424-M

2000 DEC 19 AM 9:17

THE STATE OF TEXAS

CLERK
DISTRICT COURT
DALLAS COUNTY, TEXAS
DEPUTY

§
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IN THE 194TH JUDICIAL

V.

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

**NOTICE OF INTENT TO USE
EXTRANEEOUS AND UNADJUDICATED OFFENSES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and pursuant to Rule 404(b), Texas Rules of Criminal Procedure and Art. 37.07, Code of Criminal Procedure files this Notice of Intent to Use Extraneous and Unadjudicated Offenses and respectfully shows:

I.

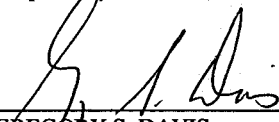
The State of Texas may offer proof of the following bad acts or unadjudicated offenses committed by Defendant at the guilt/innocence or punishment stage of this case:

1. Date: On or about October 4, 2000
County: Dallas
Victim: Bertie Cunningham
Offense or Act: Credit Card Abuse
2. Date: On or about October 5, 2000
County: Dallas
Victim: Bertie Cunningham
Offense or Act: Credit Card Abuse

3. Date: On or about October 5, 2000
County: Dallas
Victim: Francis Conner
Offense or Act: Credit Card Abuse
4. Date: On or about October 5, 2000
County: Kaufman
Victim: Bertie Cunningham
Offense or Act: Credit Card Abuse
5. Date: On or about May 13, 1999
County: Kaufman
Victim: State of Texas
Offense or Act: DWLS / Evading Arrest
6. Date: On or about May 13, 1999
County: Kaufman
Victim: Shirley Bard
Offense or Act: Terroristic Threat
7. Date: On or about August 26, 1997
County: Tarrant
Victim: Sherryl Wilhelm
Offense or Act: Kidnaping / UUMV
8. Date: On or about August 26, 1997
County: Wichita
Victim: Marjorie Ellis
Offense or Act: Robbery
9. Date: On or about August 17, 1997
County: Van Zandt
Victim: Chelsea Willis / James Lee
Offense or Act: Aggravated Assault
10. Date: On or about March 14, 1996
County: Kaufman
Victim: State of Texas
Offense or Act: Possession of Marihuana

11. Date: On or about August 19, 1995
County: Dallas
Victim: Leslie Webster
Offense or Act: Theft
12. Date: On or about June 2, 1994
County: Van Zandt
Victim: Kenneth Chrisler
Offense or Act: Theft
13. Date: On or about June 2, 1994
County: Van Zandt
Victim: Mark Read
Offense or Act: Burglary of a Vehicle
14. Date: On or about June 2, 1994
County: Van Zandt
Victim: Gary Oats
Offense or Act: Burglary of a Habitation
15. Date: On or about May 26, 1994
County: Van Zandt
Victim: Debbie Armstrong
Offense or Act: Burglary of a Vehicle
16. Date: On or about April 5, 1994
County: Van Zandt
Victim: Elizabeth Erwin
Offense or Act: Burglary of a Habitation

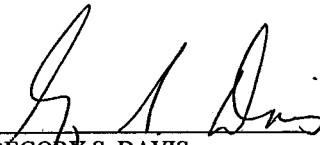
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 19th day of December, 2000.



GREGORY S. DAVIS

FILED
F00-02424-M
2001 APR 12 AM 8:31

THE STATE OF TEXAS

JIM HAMLIN
DISTRICT CLERK
DALLAS COUNTY, TEXAS
DEPUTY
§
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§

IN THE 194TH JUDICIAL

V.

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

**SUPPLEMENTAL NOTICE OF INTENT TO USE
EXTRANEIOUS AND UNADJUDICATED OFFENSES**

TO THE HONORABLE JUDGE OF SAID COURT:

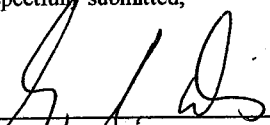
COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and pursuant to Rule 404(b), Texas Rules of Criminal Procedure and Art. 37.07, Code of Criminal Procedure files this Supplemental Notice of Intent to Use Extraneous and Unadjudicated Offenses and respectfully shows:

I.

The State of Texas may offer proof of the following bad acts or unadjudicated offenses committed by Defendant at the guilt/innocence or punishment stage of this case:

1. Date: On or about April 6, 2001
County: Dallas
Victim: Lt. T. Thompson
Offense or Act: Failure to obey jail disciplinary rules

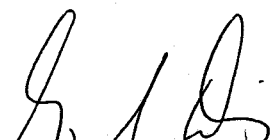
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 12th day of April, 2001.



GREGORY S. DAVIS

SUPPLEMENTAL WITNESS LIST

Nancy Sanders
Daryl Watson
Brian Sanders
Michael Pittman
T. Thompson
Bill Parker
Dep. Clifton

F00-02424-M

| | | |
|-----------------------|---|-----------------------------------|
| THE STATE OF TEXAS | § | IN THE 194 TH JUDICIAL |
| | § | |
| | § | |
| V. | § | DISTRICT COURT OF |
| | § | |
| | § | |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |

**SUPPLEMENTAL NOTICE OF INTENT TO USE
EXTRANEOUS AND UNADJUDICATED OFFENSES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and pursuant to Rule 404(b), Texas Rules of Criminal Procedure and Art. 37.07, Code of Criminal Procedure files this Supplemental Notice of Intent to Use Extraneous and Unadjudicated Offenses and respectfully shows:

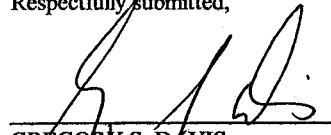
I.

The State of Texas may offer proof of the following bad acts or unadjudicated offenses committed by Defendant at the guilt/innocence or punishment stage of this case:

1. Date: On or about May 6, 2001
County: Dallas
Victim: State of Texas
Offense or Act: Possession of jail contraband, attempted suicide

FILED
2001 MAY -9 AM 9:15
JIM HANLIN
DISTRICT CLERK
DALLAS COUNTY
TEXAS
DEPUTY

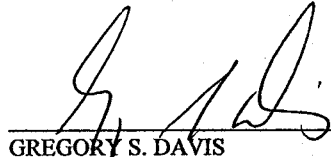
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 9th day of May, 2001.


GREGORY S. DAVIS

FILED

F00-02424-M

2000 DEC 19 AM 9:17

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

CLERK
DISTRICT CLERK
DALLAS COUNTY TEXAS
DEPUTY

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IN THE 194TH JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

NOTICE OF INTENT TO USE CERTIFIED RECORDS

TO THE HONORABLE JUDGE OF SAID COURT:

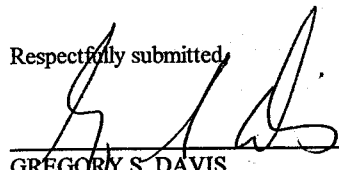
COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Notice of Intent to Use Certified Records, and respectfully shows:

I.

The State of Texas may offer the following certified records at the trial of this cause:


1. Judgment and Sentence in Cause Nos. 14,854, 14,852, 96CL-412, 99CL-1706 and F95-75692-QM..

Respectfully submitted,


GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 19th day of December, 2000.



GREGORY S. DAVIS

FILED CAUSE NO. F00-02424-M

THE STATE OF TEXAS § IN THE 194TH JUDICIAL
v. JIM HAMLIN §
DISTRICT CLERK §
DALLAS CO., TEXAS §
JEDIDIAH ISAAC MURPHY § DEPUTY §
DALLAS COUNTY, TEXAS

**MOTION TO DISCLOSE PLEA BARGAINS,
DEALS AND/ OR GRANTS OF IMMUNITY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, by and through his attorney of record, and moves this court to order the District Attorney to disclose any plea bargains, deals, and/or grants of immunity given to its witnesses or informants with respect to this action and in support thereof would respectfully show unto this Honorable Court the following:

Defendant would show that if there is any information which the District Attorney's Office has, reflecting that any witness it may or may not call has plea-bargained, made a deal with, or was granted immunity regarding such witness' activities in the case, this testimony or fact could be used by the Defendant for impeachment purposes or to shed light on the credibility of such witness in this cause. If the District Attorney does not reveal this information to Defendant, he will be secreting evidence which could alter the verdict in this action.

WHEREFORE, PREMISES CONSIDERED, the Defendant, respectfully moves the Court to order the District Attorney's Office to reveal any plea bargains, deals, or grants of immunity which were made to any witness or possible witness in this case.

MOTION TO DISCLOSE PLEA BARGAINS, DEALS,
AND/OR GRANTS OF IMMUNITY--Page 1 of 2 pages

00078

Respectfully submitted,

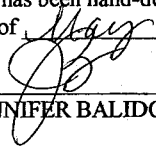


JENNIFER BALIDO
Assistant Public Defender
133 N. Industrial Blvd., LB 2
Dallas, Texas 75207
(214)653-3550
SBN: 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion has been hand-delivered to the Dallas County District Attorney's Office on this the 31 day of May, 2001.


JENNIFER BALIDO

ORDER

Came to be heard Defendant's Motion to Disclose Plea Bargains, Deals, and/or Grants of Immunity, and said Motion is hereby (GRANTED) (DENIED).

SIGNED this the ____ day of _____, 2001.

JUDGE PRESIDING

FILED

F00-02424-M AND F00-23910-M

2001 MAR -1 AM 9:43
THE STATE OF TEXAS

JUDITH HAMILTON
V. DISTRICT CLERK
DALLAS CO. TEXAS
JEDIDIAH ISAAC MURPHY

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IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

**MOTION FOR DISCOVERY OF CERTAIN INFORMATION REGARDING
POTENTIAL WITNESSES FOR THE STATE
PURSUANT TO *BRADY V. MARYLAND*
TEXAS CODE OF CRIMINAL PROCEDURE**

COMES NOW the Defendant, in the above numbered and styled cause, by and through the undersigned attorney, and presents this his Motion for Discovery of Information Regarding Potential Witnesses for the State, and in support of said motion, states the following:

I.

The State of Texas has given notice to Defendant that it intends to offer evidence regarding an extraneous offense allegedly committed by Defendant which occurred on or about August 26, 1997, in the city of Arlington, Tarrant County, Texas. The complainant in that alleged offense is Sherryl Wilhelm.

II.

The Defendant requests this Court to compel the State of Texas, through her agent, the Dallas County District Attorney's Office, the Arlington Police Department, and the Tarrant County District Attorney's Office to investigate the following:

1. Whether Ms. Wilhelm has ever been a complaining witness or a witness to any other criminal offense, and if so, the name of the defendant, case number, and type of case;

00080

2. Whether any member of the Dallas County District Attorney's Office, the Arlington Police Department or the Tarrant County District Attorney's Office ever made a reference to Ms. Wilhelm's credibility, either good or bad, or her competence as a witness;
3. Whether any member of the Dallas County District Attorney's Office, the Arlington Police Department or the Tarrant County District Attorney's Office ever failed to investigate a case, file a case, or proceed with a case based on the evaluation of Ms. Wilhelm as a good or bad, credible or incredible, or competent or not competent witness.

Moreover, the Defendant urges this court to order that, after the aforementioned agencies conduct such an investigation, those results be turned over to the Defendant for his own investigation and use at trial, under the doctrine of *Brady v. Maryland* that Defendant is entitled to any information in the possession of the State and its agents that is exculpatory or will lead to exculpatory evidence.

III.

Defendant would show that such information is solely in possession of the State of Texas and its above mentioned agents, and cannot be discovered by Defendant without this Court's order. Further, Defendant would argue that such information is critical to the effective assistance of trial counsel to competently cross-examine Ms. Wilhelm at trial. Without such information, the Defendant would be denied his rights under the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution, the Due Course of Law provision of Article I, § 19 and of the Texas Constitution, and Article 1.04 of the Texas Code of Criminal Procedure; the right to Effective Assistance of Counsel and right to Confrontation and Cross-Examination under the Sixth Amendment to the United States Constitution, Article I, § 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure; and the right to a Fair Trial under the Sixth Amendment to the United States Constitution, Article I, §§ 10 and 15

of the Texas Constitution and Article 1.05 and 36.29 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED Defendant asks that this Court grant his motion for the reasons set out above.

Respectfully Submitted,

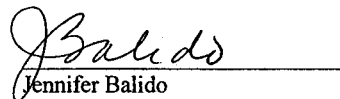


Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the foregoing motion to Greg Davis, Assistant District Attorney on the same day of filing herewith.


Jennifer Balido

ORDER

Having considered the foregoing motion, that motion is hereby _____
(GRANTED/DENIED). This the _____ day of _____, 2001.

Judge Presiding

FILED
2010 DEC 19 AM 9:17
F00-02424-M
THE STATE OF TEXAS §
V. §
JEDIDIAH ISAAC MURPHY §
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IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

MOTION TO DISCLOSE EXPERT WITNESSES AND OPINIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and pursuant to Art. 39.14, Code of Criminal Procedure files this Motion to Disclose Expert Witnesses and Opinions and respectfully shows:

I.

The State of Texas requests that the defendant disclose the name and address of each person the defendant may use at trial to present evidence under Rules 702 of the Texas Rules of Evidence.

II.

The State of Texas requests the defendant disclose each expert's opinions and facts and data underlying his opinions prior to his testimony to the jury pursuant to Rule 705 of The Texas Rules of Evidence.

WHEREFORE, PREMISES CONSIDERED, the State requests that the Court grant this motion.

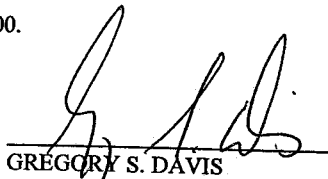
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 19th day of December, 2000.



GREGORY S. DAVIS

FILED

CAUSE NO. F00-02424-M

CAUSE NO. F00-23910-M

FILED FEB 21 PM 2:31

THE STATE OF TEXAS

§

IN THE 194TH JUDICIAL

VS.

§

DISTRICT CLERK
DALLAS CO., TEXAS
DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

§

DALLAS COUNTY, TEXAS

DISCLOSURE OF EXPERT WITNESSES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, **JEDIDIAH ISAAC MURPHY**, and responds to the

States Motion to Disclose Expert Witnesses:

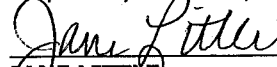
The Defense experts so far are:

Jay Crowder, MD
2201 Inwood Road
Dallas, Texas 7235

Mary Connell, Ed. D
Water Gardens Place
Suite 635
100 East Fifteenth Street
Fort Worth, Texas, 76102-6566

This case is set for trial on **June 4, 2001**. The Defense will provide other experts as they become available.

Respectfully submitted,



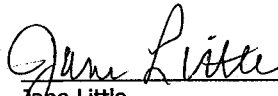
JANE LITTLE

State Bar No. 12424210
Assistant Public Defenders
133 N. Industrial Boulevard
Suite C-1., LB 2
(214) 653-3550
Dallas, Texas 75207

00085

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing Motion was served on the District Attorney of Dallas County by personal delivery on the same date of filing herewith.

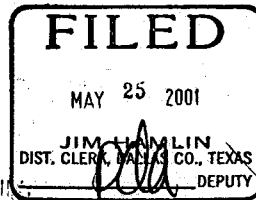

Jane Little

ORDER

On _____, the Court having considered the above and foregoing Motion finds the same is hereby ☐ GRANTED ☐ DENIED.

Judge Presiding

CAUSE NO. F00-02424-M
CAUSE NO. F00-23910-M



THE STATE OF TEXAS

VS.

JEDIDIAH ISAAC MURPHY

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IN THE 194TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

DISCLOSURE OF EXPERT WITNESSES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, JEDIDIAH ISAAC MURPHY, and responds to the States

Motion to Disclose Expert Witnesses:

Additional experts are:

Leon Peek, Ph. D
207 W. Hickory
Denton, Texas 76201

Dr. Gilda Kessner
2525 Ross
Dallas, Texas 75222

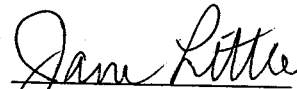
Nizam Peerwani, M.D.
200 Felix Ghodz Place
FT. Worth, Texas

Edward Hueske
Forensic Science Association
541 Halifax Lane
Coppell, Texas 75019

Jay Wimbish, Ph.D. DABFT
Diplomate American Board of
Forensic Toxicology
609 Cosby Road
Milford, Texas 76670

This case is set for trial on June 4, 2001. The Defense will provide other experts as they become available.

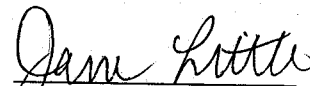
Respectfully submitted,



JANE LITTLE
State Bar No. 12424210
Assistant Public Defender
133 N. Industrial Blvd.
Suite C-1., LB 2
(214) 653-3550
Dallas, Texas 75207

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Disclosure of Expert Witness was served on the District Attorney of Dallas County by personal delivery on the same date of filing herewith.


JANE LITTLE

ORDER

On the _____ day of _____, 2001, the said Disclosure of Expert Witnesses heard, and same is hereby GRANTED/DENIED, to which action the Defendant excepts.

JUDGE PRESIDING

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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IN THE 194TH JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

STATE'S MOTION TO TAKE
DEFENSE EXPERT ON VOIR DIRE

TO THE HONORABLE JUDGE OF SAID COURT:

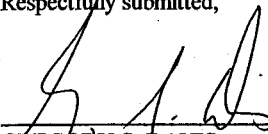
COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Motion to Take Defense Expert on Voir Dire and respectfully shows:

I.

Pursuant to Rule 705(b) of the Texas Rules of Evidence, the State requests of the Court permission to take each expert witness offered by the defense on voir dire.

WHEREFORE, the State prays the Court grant this Motion..

Respectfully submitted,


GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

FILED
2009 MAR -1 PM 1:51
CLERK
DALLAS CO. TEXAS
DEPUTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.


GREGORY S. DAVIS

the Andrews Center. The Andrews Center refuses to disclose the requested records without an order and subpoena issued in accordance with 42 CFR §2.65. Therefore, other ways of obtaining the information are not available or would not be effective.

IV.

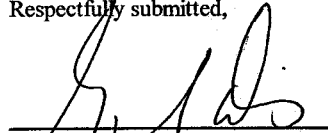
The potential injury to Defendant, to the physician-patient relationship and to the ability of the Andrews Center to provide services to other patients is outweighed by the public interest and need for the disclosure given the seriousness of the offense and the statutory and Constitutional duty on the part of the State to investigate possible exculpatory and mitigating

V.

The Andrews Center has been afforded the opportunity to be represented by independent counsel, but has declined.

WHEREFORE, the State prays the Court grant this Motion.

Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel and faxed to the Andrews Center on the 12th day of December, 2000.



GREGORY S. DAVIS

FILED

F00-02424-M

2000 DEC 19 AM 9:17

THE STATE OF TEXAS § IN THE 194TH JUDICIAL
DISTRICT CLERK §
DALLAS CO., TEXAS §
V. § DISTRICT COURT OF
JEDIDIAH ISAAC MURPHY § DALLAS COUNTY, TEXAS

**MOTION REQUESTING NOTICE OF DEFENDANT'S INTENT
TO INTRODUCE FUTURE DANGEROUSNESS EXPERT TESTIMONY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Motion and respectfully shows:

I.

Pursuant to *Lagrone v. State*, the Court may order the Defendant to submit to a state-sponsored psychiatric exam on future dangerousness "when the defense introduces, or plans to introduce, its own future dangerousness expert testimony".

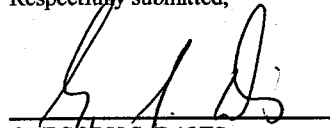
II.

The State believes the Defendant may introduce future dangerousness expert testimony in this cause. In particular, the State believes the Defendant may undergo a psychiatric exam, or engage the services of a medical doctor or other health care professional to testify about the Defendant's lack of future dangerousness. Unless the State is given timely notice of the Defendant's intention to offer evidence regarding future dangerousness, it will be denied the opportunity to request that the Defendant submit to a state-sponsored psychiatric exam prior to the defense offering its own

testimony regarding future dangerousness.

WHEREFORE, the State prays the Court grant this Motion, and order the Defendant to give the State timely notice of his intention to introduce future dangerousness expert testimony in this cause.

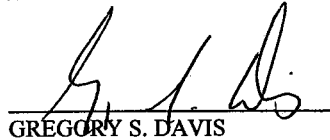
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

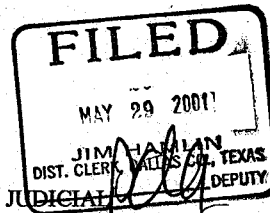
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 19th day of December, 2000.



GREGORY S. DAVIS

F00-02424-M



THE STATE OF TEXAS

IN THE 194TH JUDICIAL

V.

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

STATE'S SUPPLEMENTAL LIST OF POSSIBLE WITNESSES

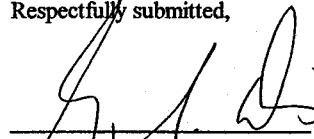
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory

S. Davis, and files this Supplemental List of Possible Witnesses:

| | |
|--------------------------------------|-----------------------------------|
| Richard Ingram, MD | <u>Dallas Sheriff's Office</u> |
| Daniel Thorn | Sgt. R. Lachman 5346 |
| John Thompson | Sgt. S. Gentry 1648 |
| Weldon Barker | DSO Rainey 724 |
| Richard Mullin | DSO Olugbode 5859 |
| Billy Hendrix | Dep. K. Cook 360 |
| Wylie Bone | DSO Jones 5757 |
| Daniel Dehart | DSO Omorogie 5745 |
| Christopher Wilcox | DSO Boozer 5823 |
| Christy Sheets | DSO Norman 5083 |
| Sandra Washington | Dep. Clements 631 |
| Dr. Moss | |
| Royce Smithey | <u>Edgewood Police Department</u> |
| Bob Murphy | Off. Vanek |
| <u>Garland Police Department</u> | |
| Off. Franey | |
| Off. Mendoza | |

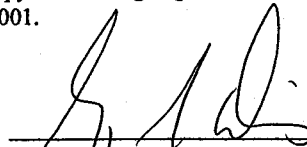
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Dallas County, Texas
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 29th day of May, 2001.

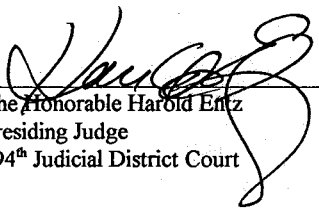

GREGORY S. DAVIS

FILED
CAUSE NUMBER F00-02424-M

THE STATE OF TEXAS 2001 MAY 17 AM 9:23 IN THE 194TH JUDICIAL
V. JIM HASLIN
CLERK
DALLAS COUNTY, TEXAS
JEDIDIAH ISAAC MURPHY DEPUTY DALLAS COUNTY, TEXAS

**ORDER ALLOWING DEFENDANT'S CRIME SCENE EXPERT
ACCESS TO VICTIM'S CAR**

This Court, having previously approved funds for Defendant to procure the services of a Crime Scene Expert, hereby orders the State to allow Defendant's Expert full access to the victim's car or make arrangements with the victim's family to provide Defendant's Expert full access to the victim's car no later than Thursday, May 24, 2001 at 5:00 p.m.


The Honorable Harold Entz
Presiding Judge
194th Judicial District Court

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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IN THE 194th JUDICIAL DISTRICT

DISTRICT COURT OF DALLAS COUNTY, TEXAS

DALLAS COUNTY, TEXAS

2001 MAR - 1 PM 1:52

FILED

STATE'S MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Motion in Limine and respectfully shows:

I.

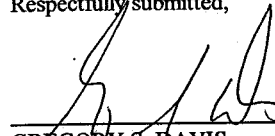
The State of Texas moves the Court to order the Defendant, his attorneys and his witnesses to not attempt to offer or refer in any manner to any of the following items until the Court has had an opportunity to rule on their admissibility:

1. Any statement that the term "society" includes only prison populations.
Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995).
2. Any statement that non-prison populations can be considered a part of "society" only if the State proves that the Defendant will be outside the penitentiary, or have influence outside the penitentiary.
Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995).
3. Any statement that the State has a burden of proving that the Defendant will be outside the penitentiary, or have influence outside the penitentiary on the special issue of future dangerousness.
Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995).

4. Any statement that the State has a burden of proof on the special issue of mitigation. *Penry v. State*, 903 S.W.2d 766 (Tex. Crim. App.), cert. Denied, 516 U.S.977, 116 S. Ct. 480, 133 L.Ed. 2d 408 (1995); *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).
5. Any statement that a particular circumstance must be considered mitigating. *Green v. State*, 934 S.W.2d 92 (Tex. Crim. App. 1996).
6. Any inquiry into how a venire person would respond to particular circumstances presented in a hypothetical question. *Cadoree v. State*, 810 S.W.2d 786 (Tex. Crim. App. 1991).
7. Any inquiry into whether a venire person would consider victim impact testimony or how much weight or effect he would give it on the issue of future dangerousness or mitigation. *Atkins v. State*, 951 S.W.2d 787 (Tex. Crim. App. 1997)
8. Any statement that the law does not allow jurors to give certain classes of witnesses a slight edge in terms of credibility. *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).
9. Any statement that the law does not allow a venire person to be predisposed toward the death penalty when answering the issue of future dangerousness. *Maldonado v. State*, 998 S.W.2d 239 (Tex. Crim. App. 1999).
10. Defendant's childhood or family photographs. *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App.1996).
11. Testimony from Defendant's family or friends regarding their feelings on the prospect of a death sentence or the impact Defendant's execution would have on them. *Fuller v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992).

WHEREFORE, the State prays the Court grant this Motion and order the Defendant, his attorneys and witnesses not to mention or allude in any way to such evidence without first advising the Court of this intention, so that the jury may be removed and a hearing held to determine the admissibility of the evidence.

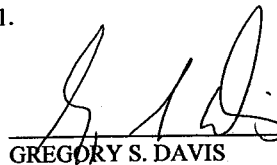
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.


GREGORY S. DAVIS

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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IN THE 194th JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

JIM HAMILL
DISTRICT CLERK
ALLAS COUNTY
DALLAS, TEXAS

2001 MAR - 1 PM 1:51

FILED

**STATE'S MOTION IN LIMINE
REGARDING MITIGATION EVIDENCE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Motion in Limine Regarding Mitigation Evidence and respectfully shows:

I.

The State has reason to believe that the defendant will attempt to offer so-called "expert" testimony regarding the issue of mitigation.

II.

The trial court is required under Texas Rule of Criminal Evidence 702 to conduct a hearing outside the presence of the jury and determine whether proffered scientific evidence is reliable and relevant to assist the jury. *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *Jordan v. State*, 928 S.W.2d 550 (Tex. Crim. App. 1996).

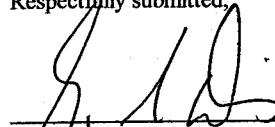
III.

The State believes such so-called "expert" testimony will lack any valid underlying scientific theory and will amount to nothing more than a self-serving, re-telling of Defendant's life story which

is neither probative nor relevant.

WHEREFORE, the State prays the Court conduct hearing under Rule 702 and grant this Motion in Limine.

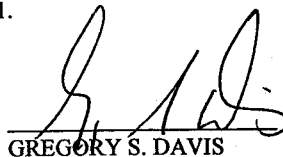
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 1st day of March, 2001.



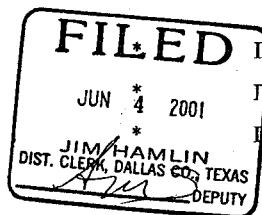
GREGORY S. DAVIS

NO. F00-02424-M

STATE OF TEXAS

VS.

JEDIDIAH ISAAC MURPHY



IN THE 194TH JUDICIAL

DISTRICT COURT

DALLAS COUNTY, TEXAS

MOTION IN LIMINE REGARDING PHOTOGRAPHS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant in the above-styled and numbered cause, by and through his attorney of record, and moves the Court to order the State not to proffer crime scene photographs in the presence of the jury until the Court has conducted a hearing and had an opportunity to rule on their admissibility, and in support of such motion Defendant would show:

I.

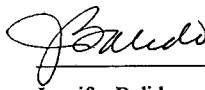
The Defendant believes that at some point in the trial the State may attempt to introduce crime scene and autopsy photographs depicting the body of the complainant in the above referenced case..

II.

These crime scene and autopsy photographs are highly prejudicial in that they would influence and inflame the jury to convict and punish the Defendant out of all proportion to their weight as probative evidence in a burglary of a habitation case. For this reason, Defendant would be denied a fair trial if such photographs were admitted.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that the Court grant this motion and order the State not to mention or allude to any such photographs, display any such photographs in the presence of the jury or proffer any such photographs without first advising the Court of this intention, so that the jury may be removed and a hearing held to determine the admissibility of the photographs.

Respectfully submitted,



Jennifer Balido
Public Defenders Office
133 N.Industrial Blvd.,LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar No. 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing Motion was served on the Dallas County District Attorney's Office by personal delivery on the same date of filing herewith.



ORDER

On the _____, the Court having considered the above and foregoing Motion finds the same is hereby **GRANTED / DENIED**.

Judge Presiding

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

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IN THE 194th JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

FILED
2001 MAR -1 PM 1:51
JIM HAMILIN
CLERK
DALLAS COUNTY
TEXAS
DEPUTY

**STATE'S RESPONSE TO DEFENDANT'S MOTION
IN LIMINE REGARDING PHOTOGRAPHS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Motion in Limine Regarding Photographs and respectfully shows:

I.

The admissibility of photographs is within the sound discretion of the trial judge. *Williams v. State*, 958 S.W.2d 186, 195 (Tex. Crim. App. 1997). When determining whether these exhibits should be admitted, the question is not whether the exhibits are more prejudicial than probative, but rather whether the probative value is substantially outweighed by the danger of unfair prejudice. *Salazar v. State*, No.73,451 (Tex. Crim. App. 2001). In determining whether the probative value of photographs is substantially outweighed by the danger of prejudice, trial courts should consider several factors, including but not limited to: (1) the number of exhibits offered; (2) their gruesomeness, size, and detail; (3) whether they are in black and white or color; (4) whether they are closeup; (5) whether the body is naked or clothed; and (6) the availability of other means of proof and the circumstances

unique to each case. *Jones v. State*, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996).

II.

Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible. *Long v. State*, 823 S.W.2d 259, 271-72 (Tex. Crim. App. 1991). Photographs of the crime scene aid the jury in determining the manner and means of death of the victim, the force used, and sometimes the identity of the perpetrator. *Williams*, at 195. In this case, the crime scene photographs will aid the jury in determining the cause of death, and the force used, They will also assist the jury in answering the special issues at the punishment phase. The photographs depict the deceased's body lying in a creek. Only two crime scene photographs depict the body. The photographs are taken at a distance, and show little detail. They are not overly gruesome. They are 8"x10" color photographs. They are taken at a distance. The deceased is fully clothed. The probative value of the crime scene photographs is not substantially outweighed by the danger of prejudice.

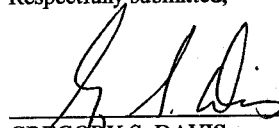
II.

Autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *Rojas v. State*, 986 S. W. 2d 241, 249 (Tex. Crim. App. 1998). In *Salazar* the Court held that photographs of some of the victim's internal organs after their removal from the victim's body were admissible. The injuries depicted in the autopsy photographs in this case were not caused by the autopsy itself. Instead, the injuries were caused by the direct actions of the Defendant; namely, shooting the deceased in the head with a handgun, and disposing of her body in a creek where it would be subject to decomposition and attack by aquatic animals. They will assist the jury in determining the cause of death, force used, and answering the special issues at the punishment phase. Although the photographs are somewhat gruesome, that fact alone does not render

them more prejudicial than probative. *May v. State*, (Tex. App. - Dallas 2000).

WHEREFORE, the State prays the Court deny Defendant's Motion in Limine Regarding Photographs and allow admission of crime scene and autopsy photographs.

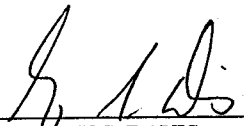
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to opposing counsel on the 15th day of March, 2001.



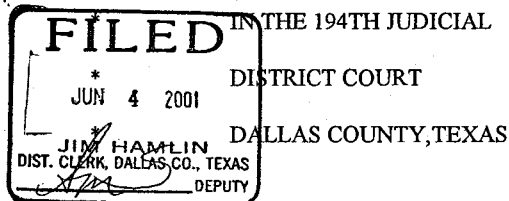
GREGORY S. DAVIS

F00-02424-M

STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY



MOTION IN LIMINE REGARDING EXTRANEOUS TRANSACTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, in the above-styled and numbered cause, by and through his attorney of record, and respectfully requests that the Court instruct the State not to mention, allude to, or refer in any manner to any extraneous transaction on the part of the Defendant until the Court has conducted a hearing and had an opportunity to rule on its admissibility and in support of such motion Defendant would show:

I.

Defendant anticipates that at some point in the trial, the State may attempt to introduce evidence that the Defendant is guilty of an offense other than the offense on trial.

II.

Defendant objects to the admission of such extraneous offense evidence under Rules 401, 402, and 403(b) of the Texas Rules of Criminal Evidence and requests the State to prove and articulate that such evidence has relevance other than proving the character of the defendant and to show he acted in conformity therewith.

III.

If the Court overrules the objection in paragraph II above, Defendant hereby requests that the Court make findings of fact and conclusions of law supporting its determination that the evidence (1) establishes an elemental fact, (2) establishes an evidentiary fact that inferentially leads to an elemental fact, (3) rebuts a defensive theory, or (4) has some other logical relevance.

IV.

Further, Defendant requests that the Court properly instruct the jury to confine and limit its consideration of such evidence to the purpose articulated by the State. Defendant asks that such instruction be given at the time the evidence is admitted in front of the jury and again in the Court's charge to the jury.

V.

Still further, Defendant would also, due to the Court admitting such evidence, object because of the unfair prejudice, confusion, misleading nature, delay and/or cumulation resulting from this evidence. Additionally, Defendant requests the Court make findings of fact and conclusions of law with regard to this evidence causing unfair prejudice, confusion, misleading, delay and/or cumulation.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Motion be granted.

Respectfully submitted,

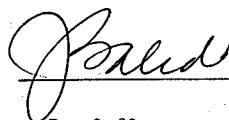


Jennifer Balido
Public Defenders Office
133 N. Industrial Blvd., LB 2
Dallas, TX 75207
214-653-3550
State Bar No. 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing motion was personally delivered to the Dallas County District Attorney's Office on the same date of filing herewith.



ORDER

On _____, the Court having considered the above and foregoing motion, finds the same is hereby **GRANTED / DENIED**.

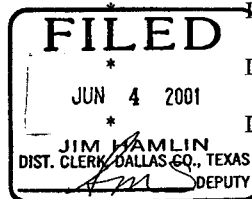
Judge Presiding

F00-02424-M

STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY



IN THE 194TH JUDICIAL

DISTRICT COURT

DALLAS COUNTY, TEXAS

MOTION IN LIMINE REGARDING ALLEGED
EVIDENCE OF SEXUAL ASSAULT OF VICTIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, in the above-styled and numbered cause, by and through his attorney of record, and respectfully requests that the Court instruct the State not to mention, allude to, or refer in any manner to any extraneous transaction on the part of the Defendant until the Court has conducted a hearing and had an opportunity to rule on its admissibility and in support of such motion Defendant would show:

I.

Defendant anticipates that at some point in the trial, the State may attempt to introduce evidence that the Medical Examiner found evidence of an injury or abnormality in the genitalia of the victim, Bertie Cunningham. Further, Defendant has found through discovery that no other evidence exists that the victim was sexually assaulted or that Defendant attempted to sexually assault her. Defendant asserts that the mere mention of the existence of this alleged injury would so inflame the jury as to deny him a fair trial. Since there is not even a scintilla of evidence that an attempted or completed sexual assault occurred, Defense would urge that the State not be allowed to mention this evidence at any time until an evidentiary hearing can be held to determine whether or not adequate evidence exists to present this issue to the jury.

II.

Defendant objects to the admission of such extraneous offense evidence under Rules 401, 402, and 403(b) of the Texas Rules of Criminal Evidence and requests the

State to prove and articulate that such evidence has relevance other than proving the character of the defendant and to show he acted in conformity therewith.

III.

If the Court overrules the objection in paragraph II above, Defendant hereby requests that the Court make findings of fact and conclusions of law supporting its determination that the evidence (1) establishes an elemental fact, (2) establishes an evidentiary fact that inferentially leads to an elemental fact, (3) rebuts a defensive theory, or (4) has some other logical relevance.

IV.

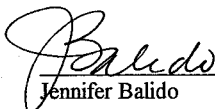
Further, Defendant requests that the Court properly instruct the jury to confine and limit its consideration of such evidence to the purpose articulated by the State. Defendant asks that such instruction be given at the time the evidence is admitted in front of the jury and again in the Court's charge to the jury.

V.

Still further, Defendant would also, due to the Court admitting such evidence, object because of the unfair prejudice, confusion, misleading nature, delay and/or cumulation resulting from this evidence. Additionally, Defendant requests the Court make findings of fact and conclusions of law with regard to this evidence causing unfair prejudice, confusion, misleading, delay and/or cumulation.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Motion be granted.

Respectfully submitted,



Jennifer Balido
Public Defenders Office
133 N. Industrial Blvd., LB 2
Dallas, TX 75207
214-653-3550
State Bar No. 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing motion was personally delivered to the Dallas County District Attorney's Office on the same date of filing herewith.

A handwritten signature in cursive script, appearing to read "J. Bullock", is written over a horizontal line.

ORDER

On _____, the Court having considered the above and foregoing motion, finds the same is hereby **GRANTED / DENIED**.

Judge Presiding

F00-02424-M

| | | |
|-----------------------|---|-----------------------|
| THE STATE OF TEXAS | § | IN THE 194th JUDICIAL |
| | § | |
| V. | § | DISTRICT COURT OF |
| | § | |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |
| | § | |

**STATE'S RESPONSE TO DEFENDANT'S MOTION
IN LIMINE REGARDING PUNISHMENT ARGUMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Motion in Limine Regarding Punishment Argument and respectfully shows:

I.

Society includes both prison and non-prison populations. *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995). The State has no burden of proving that the defendant will be outside the penitentiary or have influence outside the penitentiary regarding the issue of future dangerousness. *Smith*. Therefore, the State is entitled to argue that the jury can consider both prison and non-prison populations regarding the issue of future dangerousness.

WHEREFORE, the State prays the Court deny Defendant's Motion in Limine Regarding Punishment Argument.

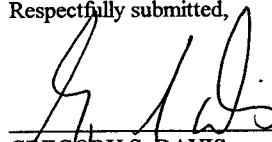
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DALLAS COUNTY, TEXAS
DISTRICT CLERK
JIM HARTLIN

2001 MAR -1 PM 1:51

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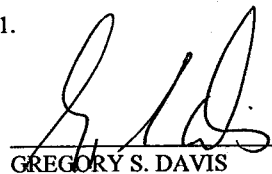
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.



GREGORY S. DAVIS

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

§
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§

IN THE 194th JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

2001 MAR -1 PM 1:50
FILED
JIM HAMMILL
CLERK OF DISTRICT COURT
DALLAS COUNTY, TEXAS

**STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE
REGARDING VICTIM IMPACT-CHARACTER TESTIMONY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Motion in Limine Regarding Victim Impact-Character Testimony and respectfully shows:

I.

The Eighth Amendment erects no per se bar to the admission of victim impact testimony. *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); *Mosley v. State*, 983 S.W.2d 249, 261-65 (Tex. Crim. App. 1998), cert. Denied, 526 U.S. 1070, 119 S. Ct. 1446, 143 L. Ed. 2d 550 (1999). In *Payne* the Court noted that information about the victim can be an important humanizing factor essential for just decision-making in a death penalty trial. The Court in *Payne* also noted "that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed".

II.

In *Mosley* the Court held that no distinction existed between impact and character evidence

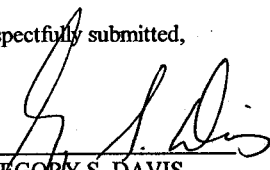
and that all such evidence was relevant to the statutory mitigation issue. The Court held that both types of evidence were admissible to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence.

III.

In *Jackson v. State*, 33 S.W.3d 828 (Tex. Crim. App. 2000) the Court held that testimony from the grandmother of two of the victims about the reaction of her son to his daughter's death was admissible and not barred by the Eighth Amendment.

WHEREFORE, the State prays the Court deny Defendant's Motion in Limine and allow the State to present victim impact and character evidence as allowed by current caselaw.

Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.


GREGORY S. DAVIS

F00-02424-M

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

§
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IN THE 194th JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

2001 MAR -1 PM 1:51

FILED

**STATE'S RESPONSE TO DEFENDANT'S MOTION
TO VOIR DIRE ON CHARACTER/VICTIM IMPACT TESTIMONY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Motion to Voir Dire on Character/Victim Impact Testimony and respectfully shows:

I.

Questions 1 and 2 are misstatements of law, confusing and improper since victim character/impact testimony has been held to be relevant to only the issue of mitigation. *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), cert. denied, 526 U.S. 1070, 119 S. Ct. 1446, 143 L. Ed. 2d 550 (1990).

II.

Questions 3 and 4 are misstatements of law, confusing and improper since victim character/impact has been held to relevant at only the punishment phase. *Mosley* at 263-64.

III.

Question 4 is a misstatement of law, confusing and improper since the State has no burden

on the issue of mitigation. *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).

WHEREFORE, the State prays the Court deny Defendant's Motion to Question Venireman on Character/Victim Impact Testimony.

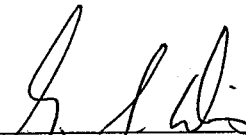
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. S. Davis', is written over a horizontal line.

GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.



GREGORY S. DAVIS

FILED
F00-02424-M
2001 MAY 31 AM 8:59
JIM HAMLIN
DISTRICT CLERK
DALLAS CO. TEXAS
DEPUTY

THE STATE OF TEXAS §
V. §
JEDIDIAH ISAAC MURPHY §

IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant in the above styled and numbered cause and moves this court to suppress the following evidence:

I.

Any and all contraband seized from his person and any evidence seized after Defendant made any post-arrest statements.

II.

Defendant would show the Court that said evidence was seized without a search warrant and was the fruit of an illegal oral or written statement by law enforcement agents while in custody. All evidence was seized without a search warrant, and such seizure was in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, Article 1.06 of the Texas Code of Criminal Procedure, and Article 38.23 of the Texas Code of Criminal Procedure.

III.

Defendant would further show that the search by police officers was without probable cause or exigent circumstances and that , in the absence of a search warrant or an exception to the search warrant requirement, and any and all statements, oral or written, by the defendant and all

other evidence is inadmissible.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion be granted in all things. Defendant further requests that the Court make and file written Finding of Facts and Conclusions of Law regarding these matters.

Respectfully Submitted,



Jennifer Balido
Assistant Public Defender
133 North Industrial, LB 2
Dallas, Texas 75207
214-653-3550
State Bar Number 10474880

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing Motion to Suppress Evidence Seized Without a Warrant was served on the Dallas County District Attorney's Office by personal delivery on the same day of filing herewith.



Jennifer Balido

ORDER

On _____, 2001, the Court, having considered the above and foregoing Motion to Suppress Statements finds the same is hereby _____.

Judge Presiding

FILED F00-02424-M

THE STATE OF TEXAS 2001 MAY 31 AM 8:59 §
V. JIM HAMLIN §
DISTRICT CLERK §
DALLAS CO., TEXAS §
JEDIDIAH ISAAC MURPHY DEPUTY §
IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

MOTION TO SUPPRESS STATEMENTS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant in the above styled and numbered cause and moves this court to excuse the jury before any evidence of an admission or confession by the Defendant, whether written or oral, is admitted into evidence in order to determine the admissibility of such statements. Defendant makes this request based on the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States constitution, Article I, Sections 9, 10 and 19 of the Texas Constitution, and articles 38.21 through 38.23 of the Texas Code of Criminal Procedure. In support of this motion, Defendant would show:

I.

At the time these statements were made by the Defendant, he was under arrest, in custody and substantially deprived of his freedom.

II.

These statements were made without the Defendant being warned of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966) and Article 38.22 of the Texas Code of Criminal Procedure.

III.

These statements were involuntary and the result of pressure and coercion by law

enforcement agents.

IV.

These statements are the direct fruit of an illegal arrest of the Defendant under the United States and Texas Constitutions and Chapter 14 of the Texas Code of Criminal Procedure.

V.

These statements were taken in violation of the Defendant's right to remain silent under the United States and Texas Constitutions.

VI.

These statements were taken in violation of the Defendant's right to counsel under the United States and Texas Constitutions.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion be granted and all statements made by him to any law enforcement agent be suppressed. Defendant further requests that the Court make and file written Finding of Facts and Conclusions of Law regarding these matters.


Respectfully Submitted,



Jennifer Balido
Assistant Public Defender
133 North Industrial, LB 2
Dallas, Texas 75207
214-653-3550
State Bar Number 10474880

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing Motion to Suppress Statements was served on the Dallas County District Attorney's Office by personal delivery on the same day of filing herewith.



Jennifer Balido

ORDER

On _____, 2001, the Court, having considered the above and foregoing Motion to Suppress Statements finds the same is hereby _____.

Judge Presiding

FILED
F00-02424-M

THE STATE OF TEXAS

2001 JUN 6 AM 8:28 IN THE 194TH JUDICIAL

v.

JIM SAMLIN
DISTRICT CLERK DISTRICT COURT OF
DALLAS CO., TEXAS

JEDIDIAH ISAAC MURPHY

DEPUTY DALLAS COUNTY, TEXAS

**MOTION TO SUPPRESS ITEMS SEIZED FROM DEFENDANT'S
CELL AT DALLAS COUNTY JAIL**

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW Defendant, in the above entitled and numbered cause and presents to this Court this, his Motion to Suppress Items Seized from Defendant's Cell at Dallas County Jail, and in support of his motion, would show the Court the following:

I.

Defendant has been incarcerated in the Dallas County Jail since October 16, 2000. Defendant asserts that, during the month of May, certain items were seized from his cell in the Dallas County Jail. Further, Defendant asserts that the seizure of such items was a improper warrantless search and seizure of his property, to which there is no exception to the warrant requirement. Defendant asserts that he has the reasonable expectation of privacy in his jail cell based on his subjective beliefs, the policies of the Dallas County Jail, and his experience having been incarcerated by Dallas County for the past eight months. Defendant asserts that the seizure of such items was a improper warrantless search and seizure of his property, to which there is no exception to the warrant requirement. Seizure of such property at that time, or any other time, was in violation of Defendant's rights guaranteed by Article I, Section 9 of the Texas Constitution, Articles 14.01 to 14.06 of the Texas Code of Criminal Procedure and article 38.23 of the Code of Criminal Procedure and the Fourth and Fourteenth Amendments to the United

States Consitution.

II.

Defendant also asserts that some or all of the materials seized in the illegal search were covered under the Attorney-Client Privilege. Defendant asserts that some or all of the materials seized were made at the request of his attorneys and prepared for that purpose. As such, Defendant would move to suppress the use of such materials, and the use of any evidence that was based on or directed to by the illegally seized and privileged evidence. The use of such evidence would violate his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, sections 10, 13, 15 and 19 of the Texas Constitution, and Articles 1.04, 1.05, 38.08, and 38.23 of the Texas Code of Criminal Procedure.

WHEREFORE PREMISES CONSIDERED, Defendant prays that this Court grant his motion in all things.

Respectfully Submitted,



Jennifer Balido
Public Defender's Office
133 N. Industrial, LB 2
Dallas, Texas 7507
State Bar Number 10474880

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered to the District Attorney a copy of this motion the same date of filing herewith.



ORDER

Having considered the foregoing motion, that motion is hereby _____.

This the _____ day of _____, 2001.

Judge Presiding

FILED
F00-02424-M AND F00-23910-M

THE STATE OF TEXAS 2001 MAR 3 AM 11:39 IN THE 194TH JUDICIAL
V. JIMMYE L. L. §
DISTRICT COURT OF §
DALLAS COUNTY, TEXAS §
JEDIDIAH ISAAC MURPHY § DEPUTY § DALLAS COUNTY, TEXAS

**MOTION TO ALLOW QUESTIONING OF VENIRE REGARDING
SPECIFIC ISSUES IN THIS CASE**

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW Defendant in the above entitled and numbered cause and presents to this Court this Motion to Allow Questioning of Venire Regarding Specific Issues in this Case, and in support of said motion, shows the following:

I.

Defendant would like to ask each potential juror in this case the following question, and any other question that might be relevant to the potential juror's answer:

"In a hypothetical case, could you be a fair and impartial juror if the evidence was such that the victim in the case was an 80-year-old woman?"

II.

Defendant asserts that he is entitled to ask this question of the potential jurors, and denial of the ability to question the potential jurors in this way violates his right to a fair and impartial jury under Article I, § 10 of the Texas Constitution, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article 35.15 of the Texas Code of Criminal Procedure, and the holdings of the Texas Court of Criminal Appeals in the cases of *Nunfio v. State*, 808 S.W.2d 482

(Tex. Crim. App. 1991), *Maddux v. State*, 862 S.W.2d 590 (Tex. Crim. App. 1993, *reh'g denied*); and *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1997).

A question on voir dire is proper if its purpose is to discover a juror's views on an issue applicable in the case. *McKay v. State*, 819 S.W.2d 478, 482 (Tex. Crim. App. 1991), and *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991). The trial court must not restrict proper questions which seek to discover a juror's views on an issue applicable to the case. *Boyd v. State*, 811 S.W.2d 105, 115 (Tex. Crim. App. 1991). The Court of Criminal Appeals has held that the right to pose proper questions during voir dire examination is included in the right to counsel under Article I, §10 of the Texas Constitution. *Howard v. State*, 941 S.W.2d 102, 108 (Tex. Crim. App. 1997).

In *Nunfio*, the Texas Court of Criminal Appeals held that denial of proper voir dire questions as to possible juror bias or prejudice in favor of the victim, in that case, a nun, was reversible error, in that it denied the defendant the ability to intelligently exercise his peremptory challenges. The Court found that the harm lies in the denial of the ability to intelligently exercise the peremptory strikes, and in that case, found that "this is one error which requires reversal of the conviction without the necessity of an inquiry into harmfulness." *Nunfio v. State*, 808 S.W.2d at 485.

The Court of Criminal Appeals further made clear, in *Maddux*, that their holding in *Nunfio* was applicable to non-testifying witnesses such as deceased victims. *Maddux v. State*, 862 S.W.2d at 590. The victim in the *Maddux* case was a two and one-half year old child. The trial court prevented defense counsel from asking the venire members questions regarding a victim's status as a child. The Court found that the question sought to be asked in that case was proper because it sought to elicit potential bias in favor of the deceased's status as a child.

Maddux v. State, 862 S.W.2d at 591. Further, the Court stated that it was reaffirming their holding in *Nunfio* that **defense counsel is entitled to discover a veniremember's bias in favor of the complainant's status, e.g., as a nun in *Nunfio*, or in the *Maddux* case, a child.**

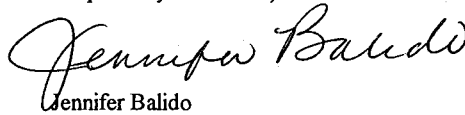
Moreover, the Court averred that it was not "in any way, abrogating the long standing rule prohibiting counsel from committing the veniremembers to a certain verdict to a certain verdict given particular facts, *citing, e.g., Allridge v. State*, 762 S.W.2d 146, 162-64 (Tex. Crim. App. 1988), but held that the trial court abused its discretion when it prevented defense counsel from asking his question regarding the status of the victim. *Maddux v. State*, 862 S.W.2d at 592.

III.

In the present case, defendant desires to question veniremembers regarding their bias in favor of the complainant's status, being an 80-year-old woman. Denial of such questioning of potential jurors in this case would deny his right to counsel under Article I, § 10 of the Texas Constitution, the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 35.15 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grant this motion in all things.

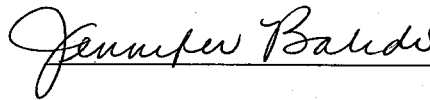
Respectfully Submitted,



Jennifer Balido
133 N. Industrial, LB 2
Dallas, Texas 75201
214-653-3550
State Bar Number 10474880

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the foregoing motion to Greg Davis, Assistant District Attorney for Dallas County, on the same day of filing herewith.



ORDER

Having considered the foregoing motion, that motion is hereby (GRANTED/DENIED)

Judge Presiding

F00-02424-M

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|-----------------------|---|-----------------------|
| THE STATE OF TEXAS | § | IN THE 194th JUDICIAL |
| | § | |
| | § | |
| V. | § | DISTRICT COURT OF |
| | § | |
| | § | |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |

**STATE'S RESPONSE TO DEFENDANT'S MOTION
REGARDING PRIOR JURY SERVICE**

TO THE HONORABLE JUDGE OF SAID COURT:

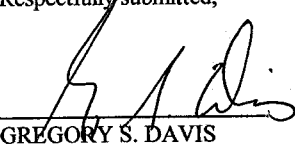
COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Motion Regarding Prior Jury Service and respectfully shows:

I.

The State has no obligation to furnish counsel for accused with information he has in regard to prospective jurors. *Martin v. State*, 577 S.W.2d 490 (Tex. Crim. App. 1979).

WHEREFORE, the State prays the Court deny Defendant's Request for Discovery of Information Regarding Prior Jury Service.

Respectfully submitted,


GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

FILED
2001 MAR -1 PM 1:50
JUDICIAL DISTRICT CLERK
DALLAS COUNTY, TEXAS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.


GREGORY S. DAVIS

F00-02424-M

| | | |
|-----------------------|---|-----------------------|
| THE STATE OF TEXAS | § | IN THE 194th JUDICIAL |
| | § | |
| V. | § | DISTRICT COURT OF |
| | § | |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |

**STATE'S RESPONSE TO DEFENDANT'S REQUEST TO
UTILIZE PEREMPTORY CHALLENGES FOLLOWING
EXAMINATION OF THE ENTIRE VENIRE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her Assistant District Attorney, Gregory S. Davis, and files this Response to Defendant's Request to Utilize Peremptory Challenges Following Examination of the Entire Venire and respectfully shows:

I.

Article 35.13 of the Texas Code of Criminal Procedure controls the order and timing of peremptory challenges in capital cases. *Busby v. State*, 990 S.W.2d 263 (Tex. Crim. App. 1999); *Grijalva v. State*, 614 S.W.2d 420 (Tex. Crim. App. 1980). In *Grijalva* the Court held:

"It is clear that in capital cases each party must exercise any peremptory challenge at the time the particular prospective juror has been qualified. The parties may not wait until all prospective jurors have been examined before exercising peremptory challenges as is allowed in non-capital cases".

II.

The statutory procedure controlling the order and timing of peremptory challenges

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DISTRICT CLERK
DALLAS COUNTY, TEXAS

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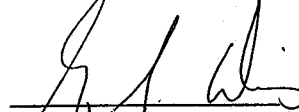
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in capital cases is not absolute and may be waived by the parties. *Busby*. However, in this case, the State is **not** waiving the procedures set forth in Art. 35.13. This Court, therefore, is bound by Art. 35.13, and each party must exercise any peremptory challenge at the time the particular prospective juror has been qualified.

WHEREFORE, the State prays the Court deny Defendant's Request to Utilize Peremptory Challenges Following Examination of the Entire Venire, and require each party to exercise its challenge at the time the particular prospective juror has been qualified.

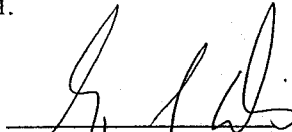
Respectfully submitted,



GREGORY S. DAVIS
Assistant District Attorney
Bar No. 05493550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing instrument was hand-delivered to
opposing counsel on the 1st day of March, 2001.



GREGORY S. DAVIS

FILED

F00-02424-M AND F00-23910-M

2001 MAR -1 AM 9:40
THE STATE OF TEXAS § IN THE 194TH JUDICIAL
V. §
JEDIDIAH ISAAC MURPHY § DISTRICT COURT OF
§ DALLAS COUNTY, TEXAS

**MOTION TO DENY TELEVISION CAMERAS FROM FILMING
ANY PART OF THE TRIAL**

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW the Defendant in the above entitled cause, represented by Defendant's counsel, and makes this his Motion to Deny Television Cameras from Filming Any Part of his Trial, and in support of this motion would show the Court the following:

I.

Defendant stands charged with the offense of Capital Murder. The State of Texas has given notice to Defendant of its intention to seek the Death Penalty. The case is currently set for trial for May 29, 2001, with jury selection to begin March 2, 2001.

II.

On today's date, February 28, 2001, the Court informed Defendant's counsel that a local television station requested the ability to film (without sound) the general portion of *voir dire* and to film (**with** sound) the evidentiary portions of the trial. Defendant objects to any television coverage of this case.

III.

The offense in this case is alleged to have occurred on October 4, 2000. While there was considerable publicity regarding the offense surrounding the offense date, in the past few months,

there has been little, if any, publicity regarding the upcoming trial date. As a result of the lack of pretrial publicity, counsel for Defendant has not seen the need to file a motion to transfer venue to a different county pursuant to Texas Code of Criminal Procedure Chapter 31. At this point, Defendant has no way of knowing or no way of predicting how much publicity will be generated if this Court grants the request of the television station, whether the coverage will be extensive, widespread or inflammatory, or how much affect it will have on the potential jurors in this case and the ability to obtain a fair trial at this place of venue. Since Texas courts have failed to recognize that mid-trial publicity is subject to a motion to transfer venue, *Herbst v. State*, 941 S.W.2d 371 (Tex. App-Beaumont 1997), after the commencement of jury selection (and hence after the first television filming and broadcast) the Defendant essentially has no procedural vehicle to combat the potential prejudice of pre-trial or mid-trial publicity. Defendant hereby asks the Court not to allow television filming inside the courtroom or outside the courtroom during any part of the trial.

IV.

If this Court allows television media access to this trial, Defendant argues that he would be prejudiced for the reasons set out in his counsel's *ex parte* affidavit attached to this motion. This affidavit is being filed *ex parte* due to matters in the affidavit being covered by the Work Product doctrine.

V.

The television media has requested that it be granted access to the General Voir Dire portion of the trial. That portion of the trial is scheduled for March 2, 2001. Individual Voir Dire is not to commence until March 12, 2001 and evidence in the case is not to be heard until

May 29, 2001. It is assumed by the Defendant that, along with the footage of General Voir Dire, the media will include alleged circumstances surrounding the case and matters that may not be admissible in the evidentiary part of the trial. Prejudice from this information being heard by potential jurors cannot be cured by an instruction. Additionally, the answers of the potential jurors on the questionnaires to questions regarding pretrial publicity may be different during the individual voir dire in coming weeks than the answers they will give on the questionnaire, thus rendering the question of pretrial publicity on the questionnaire as moot. The Defendant thus requests that, if this Court grants the television media access to the voir dire portion of the trial, the potential jurors on the jury panel be sequestered until they have been struck by either party or otherwise discharged from service in this case.

VI.

News reporters have a right under the First Amendment to attend a public criminal trial and publish stories about it, but the trial judge has the authority to exclude the media from the courtroom to protect the defendant's "superior right" to an impartial jury. *Richmond News v. Virginia*, 448 U.S. 555, 564 (1980)(judge must consider alternative means of protecting defendant's rights before he excludes press from public trial); *see also Gannett v. DePasquale*, 443 U.S. 369, 378-79 (1979)(exclusion of press from pretrial hearings is "often one of the most effective methods" for protecting defendant's right to an impartial jury). In the case at bar, Defendant is not trying to bar the press from the courtroom, but rather to limit the **type** of coverage allowed to the press. Surely the Defendant's right to a fair trial and a fair and impartial jury would supercede the media's right to choose the most inflammatory type of press coverage.

VII.

Further, Defendant would argue that he has not been given adequate notice or opportunity to be heard on the question of whether it will violate his constitutional right to an impartial jury, as mandated under *Chandler v. Florida*, 449 U.S. 560, 577 (1981). Counsel was notified of the media's request orally by the Court on February 28, 2001, with the General Voir Dire to commence on March 2, 2001.

VIII.

If this Court decides to allow the television media access to the General Voir Dire and the evidentiary portions of the trial, Defendant will be denied his rights under the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution, the Due Course of Law provision of Article I, § 19 and of the Texas Constitution, and Article 1.04 of the Texas Code of Criminal Procedure; the right to Effective Assistance of Counsel and right to Confrontation and Cross-Examination under the Sixth Amendment to the United States Constitution, Article I, § 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure; and the right to a Fair Trial under the Sixth Amendment to the United States Constitution, Article I, §§ 10 and 15 of the Texas Constitution and Article 1.05 and 36.29 of the Texas Code of Criminal Procedure.

Defendant urges this Court not to grant television media access to this trial. If the Court grants the television media's request, Defendant requests that, in the interest of justice, this Court sequester all potential jurors until such time that they have been struck by either party or otherwise discharged from service in this case.

WHEREFORE, PREMISES CONSIDERED Defendant asks that this Court grant his motion for the reasons set out above.

Respectfully Submitted,

Jennifer Balido

Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the foregoing motion to Greg Davis, Assistant District Attorney on the same day of filing herewith.

Jennifer Balido
Jennifer Balido

ORDER

Having considered the foregoing motion, that motion is hereby _____
(GRANTED/DENIED). This the _____ day of _____, 2001.

Judge Presiding

CAUSE NO. F00-02424

STATE OF TEXAS

§

VS.

§

JEDIDIAH I. MURPHY

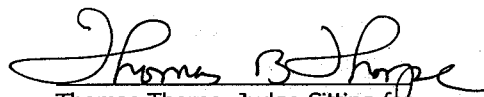
§

FILED
JUN 4 2001
IN THE 194TH JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

DALLAS COUNTY, TEXAS

ORDER

Based on Defendant's previously filed and granted Ex Parte Motions concerning Medical Experts and Examinations and for good cause shown, it is the order of this court that the Dallas County Sheriff's Office transport from the Dallas County Jail to Parkland Memorial Hospital the person of Jedidiah I. Murphy, defendant in the above styled and numbered cause, where he shall be examined by an orthopedic surgeon specializing in the hand, and given an E.M.G. test and a Nerve Conduction test and any other medically necessary test or procedure to determine the medical condition of said defendants left hand. Said transport and examination to be completed by June 4, 2001.



Thomas Thorpe, Judge Sitting for
Sitting for Harold Entz, Judge
194th Judicial District Court

5/24/01

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

FILED
F00-02424-M

2001 JUN 12 AM 8:33

IN THE 194TH JUDICIAL

JIM SHAMLIN
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

MOTION FOR JURY INSTRUCTIONS REGARDING EVIDENCE
INTRODUCED AT PUNISHMENT FOR CONSIDERATION OF SPECIAL ISSUES

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW Defendant, by and through his appointed counsel, in the above entitled and numbered cause and presents in and to this Court his Motion for Jury Instructions Regarding Evidence Introduced at Punishment for Consideration of Special Issues, and in support of such motion, would show the following:

I.

Defendant was convicted in this case by this jury of the felony offense of Capital Murder. The State of Texas has given notice at an earlier date that it will seek the Death Penalty upon such a guilty verdict. The State of Texas is scheduled to begin to introduce evidence and present testimony this morning, June 12, 2001 for the jury's consideration of the Special Issues mandated by the Texas Capital Sentencing Statute (Texas Code of Criminal Procedure 37.071). The State of Texas has given Defendant notice (both oral and written) that it plans on introducing a number of extraneous offenses in its punishment evidence.

II.

In regard to any evidence that would constitute a prior bad act or extraneous offense, the

Defendant would ask the Court to instruct the jury that they cannot consider an unadjudicated offense or other misconduct unless the State proves beyond a reasonable doubt that appellant committed the alleged acts.

III.

Further, the Defendant would request that the Court instruct the jury that they may only apply evidence of extraneous offenses, other misconduct, or other bad acts, in consideration of Special Issue Number One (usually termed the "future dangerousness" issue), as follows:

The State has introduced evidence that the defendant has committed unadjudicated criminal offenses and/or bad acts. You shall only consider such evidence in answering the first special issue that deals with the issue of a continuing threat to society, if it helps you answer that issue.

The purpose of a limiting instruction is to ensure that the jury does not make use of admitted evidence for an impermissible purpose. *Lane v. State*, 822 S.W.2d 35, 40 (Tex. Crim. App. 1991). The Court of Criminal Appeals, however, held that, since the evidence could be considered on the additional issue of whether or not the actions of Lane were deliberate (under the prior Texas capital sentencing statute), the instruction was not proper. *Lane v. State*, 822 S.W.2d at 40. Such is not the case here. In the present case, the only issue to which extraneous offense evidence might be admissible and relevant is the future threat to society issue; thus, the above instruction would be proper in this case.

IV.

Defendant requests this additional charge, as well:

In deciding whether the defendant committed any alleged unadjudicated extraneous offenses or bad acts, the jury must not consider the fact that the defendant committed the


capital murder alleged in the indictment. That is, you should not presume that the defendant has a propensity to commit criminal acts generally, merely because you have convicted him of capital murder. The state must prove to you that the defendant committed any unadjudicated extraneous offenses beyond a reasonable doubt.

Furthermore, if you find that the defendant committed one or more unadjudicated extraneous offenses, you must not consider that fact in deciding whether he committed other unadjudicated extraneous offenses alleged by the state.

Defendant would request that the above instruction be given to the jury at the beginning of the punishment phase of the trial. Additionally, Defendant would request that the above instruction be given at any time that the State re-offers for the jury's consideration, all of the evidence from the guilt-innocence portion of the trial. Moreover, Defendant requests that this instruction be given to the jury each and every time the State presents evidence regarding extraneous offenses, bad acts, or acts of misconduct.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that his Motion be granted in all things.

Respectfully Submitted,



Jennifer Balido
133 N. Industrial, LB 2
Dallas, Texas 75201
214-653-3550
State Bar Number 10474880

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered the foregoing motion to Greg Davis, Assistant District Attorney for Dallas County, on the same day of filing herewith.

A handwritten signature in cursive script, appearing to read "Greg Davis", is written over a horizontal line.

ORDER

Having considered the foregoing motion, that motion is hereby (GRANTED/DENIED)

Judge Presiding

FILED
F00-02424-M

THE STATE OF TEXAS

2001 JUN -5 AM 8:16 IN THE 194TH JUDICIAL

v.

CLERK
DALLAS COUNTY, TEXAS
DEPUTY

DISTRICT COURT OF

JEDIDIAH ISAAC MURPHY

DALLAS COUNTY, TEXAS

**MOTION FOR MISTRIAL PURSUANT TO THE DECISION
OF THE UNITED STATES SUPREME COURT IN *PENRY II***

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW, THE Defendant, by and through his court appointed counsel, and presents in and to this Court, this his Motion for Mistrial Pursuant to the Decision of the United States Supreme Court in *Penry v. Johnson*, No. 00-6677 (U.S. Sup. Ct. June 4, 2001), and in support of such motion, would show the following:

I.

Defendant is charged with Capital Murder. The State of Texas has given this Court and the Defendant notice that it intends to seek the Death Penalty, pursuant to Texas Code of Criminal Procedure 37.071. Jury selection for this case commenced on March 3, 2001. Individual questioning of potential jurors began on March 12, 2001. Pursuant to the Texas Capital Murder Sentencing Statute and relevant case law at the time of jury selection, jurors were questioned as to whether or not they could follow the law regarding the two applicable special issues in the punishment phase of the trial.

II.

During individual questioning of potential jurors, counsel for Defendant repeatedly attempted to inquire of the jurors not only whether they could "consider" mitigating circumstances, but rather whether they could "consider and give effect to [a defendant's

mitigating] evidence", pursuant to the U.S. Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989)(*Penry I*). On every occasion, while this Court required answers to questions whether the juror could consider mitigating evidence such as age, mental illness, mental retardation, alcohol or drug addiction, remorse, defendant's character and background, *ad infinitum*, the trial court did not require (and more importantly **did not allow**) answers to questions whether the juror would consider and give effect to such evidence.

III.

Defendant asserts that the jury selection process in this case is in conflict with the United States Supreme Court's decision handed down June 4, 2001, the first day of testimony in this case, in *Penry v. Johnson*, No. 00-6677 (U.S. Sup. Ct. June 4, 2001). In that case, the majority writes:

Penry I did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence." 492 U.S. at 319 (emphasis added). See also *Johnson v. Texas*, 509 U.S. 350, 381 (1983) (O'Connor, J., dissenting)("[A] sentencer [must] be allowed to give full effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence," *id.*, at 319 (quoting *Woodson v. North Carolina*, 438 U.S. 280, 304, 305 (1976)).

No. 00-6677 at 6.

IV.

Further, Defendant asserts that the second special issue (regarding mitigation), is "at the very least, 'a reasonable likelihood that the jury [could apply] the...instruction in a way that prevent[s] the consideration' of Defendant's mitigating evidence to be developed at trial. *Boyde v.*

California, 494 U.S. 370, 380 (1990). Instructions of the Texas Capital Murder Sentencing Statute provides an inadequate vehicle for the jury to make a reasoned moral response to Defendant's mitigating evidence. *Penry II*, No. 00-6677 at 6. Such inadequacy is evidence when it is noted that the same evidence that can be considered and given effect as mitigating in Special Issue Two can be considered as aggravating or proof of future dangerousness under Special Issue One.

WHEREFORE, PREMISES CONSIDERED, Defendant urges this Court hereby declares a mistrial and allow jury selection to commence immediately allowing questions to be posed to potential jurors regarding their ability to consider and give full mitigating effect to any evidence relevant to Special Issue Number Two.

Respectfully Submitted,

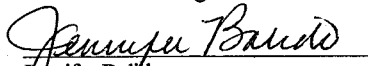


Jennifer Balido
Assistant Public Defender
133 North Industrial, LB 2
Dallas, Texas 75207
214-653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I personally served upon Greg Davis, Assistant District Attorney for Dallas County, a copy of the foregoing motion on the same date of filing herewith.


Jennifer Balido

ORDER

Having considered the foregoing motion, relevant case law, and arguments of counsel, the motion is hereby _____.

This the _____ day of _____, 2001.

JUDGE PRESIDING

v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZO.html>



Supreme Court Collection

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v. JOHNSON (00-6677)

215 F.3d 504, affirmed in part, reversed in part, and remanded.

| | | |
|--------------|-----------------------|-------------------|
| Syllabus | Opinion [O'Connor] | Other [Thomas] |
| HTML version | HTML version | HTML version |
| PDF version | PDF version | PDF version |

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 00—6677

JOHNNY PAUL PENRY, PETITIONER v. GARY L.
JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 4, 2001]

Justice O'Connor delivered the opinion of the Court.

In 1989, we held that Johnny Paul Penry had been sentenced to death in violation of the Eighth Amendment because his jury had not been adequately instructed with respect to mitigating evidence. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). The State of Texas retried Penry in 1990, and that jury also found him guilty of capital murder and sentenced him to death. We now consider whether the jury instructions at Penry's resentencing complied with our mandate in *Penry I*. We also consider whether the admission into evidence of statements from a psychiatric report based on an uncounseled interview with Penry ran afoul of the Fifth Amendment.

I

Johnny Paul Penry brutally raped and murdered Pamela Carpenter on October 25, 1979. In 1980, a Texas jury found him guilty of capital murder. At the close of the penalty hearing, the jury was instructed to answer three statutorily mandated "special issues":

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

00156

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v. JOHNSON

<http://supp.law.cornell.edu/supct/html/00-6677.ZO.html>

“(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

“(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.” *Id.*, at 310 (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

The jury answered “yes” to each issue and, as required by statute, the trial court sentenced Penry to death. 492 U.S., at 310—311.

Although Penry had offered extensive evidence that he was mentally retarded and had been severely abused as a child, the jury was never instructed that it could consider and give mitigating effect to that evidence in imposing sentence. *Id.*, at 320. Nor was any of the three special issues broad enough in scope that the jury could consider and give effect to the mitigating evidence in answering the special issue. *Id.*, at 322—325. While Penry’s mental retardation was potentially relevant to the first special issue—whether he had acted deliberately—we found no way to be sure that the jurors fully considered the mitigating evidence as it bore on the broader question of Penry’s moral culpability. *Id.*, at 322—323. As to the second issue—whether Penry would be a future danger—the evidence of his mental retardation and history of abuse was “relevant only as an *aggravating* factor.” *Id.*, at 323 (emphasis in original). And the evidence was simply not relevant in a mitigating way to the third issue—whether Penry had unreasonably responded to any provocation. *Id.*, at 324—325.

The comments of counsel also failed to clarify the jury’s role. Defense counsel had urged the jurors to vote “no” on one of the special issues if they believed that Penry, because of the mitigating evidence, did not deserve to be put to death. The prosecutor, however, had reminded them of their “oath to follow the law and ... answer these questions based on the evidence and following the law.” *Id.*, at 325 (internal quotation marks omitted).

“In light of the prosecutor’s argument, and ... in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry’s mental retardation and abused background by declining to impose the death penalty,” we concluded that “a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” *Id.*, at 326, 328. We thus vacated Penry’s sentence, confirming that in a capital case, “[t]he sentencer must ... be able to consider and give effect to [mitigating] evidence in imposing sentence,” so that “the sentence imposed ... reflect[s] a reasoned moral response to the defendant’s background, character, and crime.” *Id.*, at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (emphasis in original)).

Penry was retried in 1990 and again found guilty of capital murder. During the penalty phase, the defense again put on extensive evidence regarding Penry’s mental impairments and childhood abuse. One defense witness on the subject of Penry’s mental impairments was Dr. Randall Price, a clinical neuropsychologist. On direct examination, Dr. Price testified that he believed Penry suffered from organic brain impairment and mental retardation. App. 276—279; 878. In the course of cross-examining Dr. Price, the prosecutor asked what records Price had reviewed in preparing his testimony. Price cited 14 reports, including a psychiatric evaluation of Penry prepared by Dr. Felix Peebles on May 19, 1977. *Id.*, at 327. The Peebles report had been prepared at the request of Penry’s then-counsel to determine Penry’s competency to stand trial on a 1977 rape charge—unrelated to the rape and murder of Pamela Carpenter. *Id.*, at 55—60, 125. The prosecutor asked Dr. Price to read a specific portion of the Peebles report for the jury. Over the objection of defense counsel, Dr. Price recited that it was Dr. Peebles’ “professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.” *Id.*, at 413. The prosecutor again recited this portion of the Peebles report during his closing argument. *Id.*, at 668.

When it came time to submit the case to the jury, the court instructed the jury to determine Penry’s sentence by answering three special issues—the same three issues that had been put before the jury in *Penry I*. Specifically, the jury had to determine whether Penry acted deliberately when he killed Pamela

00157

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v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZO.html>

Carpenter; whether there was a probability that Penry would be dangerous in the future; and whether Penry acted unreasonably in response to provocation. App. 676—678. Cf. *Penry I*, 492 U.S., at 320.

The court told the jury how to determine its answers to those issues:

“[B]efore any issue may be answered ‘Yes,’ all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be ‘Yes.’ ... [I]f any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered ‘Yes,’ then such juror should vote ‘No’ to that Special Issue.” App. 672—673.

The court explained the consequences of the jury’s decision:

“[I]f you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.” *Id.*, at 674—675.

The court then gave the following “supplemental instruction”:

“You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant’s character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant’s personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.” *Id.*, at 675.

A complete copy of the instructions was attached to the verdict form, and the jury took the entire packet into the deliberation room. Tr. of Oral Arg. 31. The verdict form itself, however, contained only the text of the three special issues, and gave the jury two choices with respect to each special issue: “We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is ‘Yes,’” or “We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is ‘No.’” App. 676—678.

After deliberating for approximately 2½ hours, the jury returned its punishment verdict. See 51 Record 1948, 1950. The signed verdict form confirmed that the jury had unanimously agreed that the answer to each special issue was “yes.” App. 676—678. In accordance with state law, the court sentenced Penry to death.

The Texas Court of Criminal Appeals affirmed Penry’s conviction and sentence. The court rejected Penry’s claim that the admission of language from the 1977 Peebles report violated Penry’s Fifth Amendment privilege against self-incrimination. The court reasoned that because Dr. Peebles had examined Penry two years prior to the murder of Pamela Carpenter, Penry had not at that time been “confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated.” *Penry v. State*, 903 S. W. 2d 715, 759—760 (1995) (internal quotation marks and citation omitted).

The court also rejected Penry’s claim that the jury instructions given at his second sentencing hearing were constitutionally inadequate because they did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse. The court cited *Penry I* for the

v. JOHNSON

<http://sur-law.cornell.edu/supct/html/00-6677.ZO.html>

proposition that when a defendant proffers “mitigating evidence that is not relevant to the special issues or that has relevance to the defendant’s moral culpability beyond the scope of the special issues ... the jury must be given a special instruction in order to allow it to consider and give effect to such evidence.” 903 S. W. 2d, at 765. Quoting the supplemental jury instruction given at Penry’s second trial, see *supra*, at 5—6, the court overruled Penry’s claim of error. The court stated that “a nullification instruction such as this one is sufficient to meet the constitutional requirements of [*Penry I*].” 903 S. W. 2d, at 765.

In 1998, after his petition for state habeas corpus relief was denied, see App. 841 (trial court order); *id.*, at 863 (Court of Criminal Appeals order), Penry filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 ed. and Supp. V) in the United States District Court for the Southern District of Texas. The District Court rejected both of Penry’s claims, finding that the Texas Court of Criminal Appeals’ conclusions on both points were neither contrary to, nor an unreasonable application of, clearly established federal law. App. 893, 920. After full briefing and argument, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. 215 F.3d 504 (2000).

We stayed Penry’s execution and granted certiorari to consider Penry’s constitutional arguments regarding the admission of the Peebles report and the adequacy of the jury instructions. 531 U.S. 1010 (2000).

II

Because Penry filed his federal habeas petition after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the provisions of that law govern the scope of our review. Specifically, 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. V) prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

Last Term in *Williams v. Taylor*, 529 U.S. 362 (2000), we explained that the “contrary to” and “unreasonable application” clauses of §2254(d)(1) have independent meaning. *Id.*, at 404. A state court decision will be “contrary to” our clearly established precedent if the state court either “applies a rule that contradicts the governing law set forth in our cases,” or “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Id.*, at 405—406. A state court decision will be an “unreasonable application of” our clearly established precedent if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.*, at 407—408.

“[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Id.*, at 409. Distinguishing between an unreasonable and an incorrect application of federal law, we clarified that even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable. *Id.*, at 410—411.

Although the District Court evaluated the Texas Court of Criminal Appeals’ disposition of Penry’s claims under a standard we later rejected in *Williams*, see App. 882 (stating that an application of law to facts is “unreasonable ‘only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect’ ” (citation omitted)), the Fifth Circuit articulated the proper standard of review, as set forth in §2254(d)(1) and clarified in *Williams*, and denied Penry relief. Guided by this same standard, we now turn to the substance of Penry’s claims.

III

A

Penry contends that the admission into evidence of the portion of the 1977 Peebles report that referred to Penry’s future dangerousness violated his Fifth Amendment privilege against self-incrimination

00159

v. JOHNSON

<http://sur-law.cornell.edu/supct/html/00-6677.ZO.html>

because he was never warned that the statements he made to Dr. Peebles might later be used against him. The Texas Court of Criminal Appeals disagreed, concluding that when Dr. Peebles interviewed Penry, Peebles was not acting as an agent for the State in order to gather evidence that might be used against Penry. 903 S. W. 2d, at 759.

Penry argues that this case is indistinguishable from *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, we considered a situation in which a psychiatrist conducted an ostensibly neutral competency examination of a capital defendant, but drew conclusions from the defendant's uncounseled statements regarding his future dangerousness, and later testified for the prosecution on that crucial issue. We likened the psychiatrist to "an agent of the State recounting unwarned statements made in a postarrest custodial setting," and held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.*, at 467—468. The admission of the psychiatrist's testimony under those "distinct circumstances" violated the Fifth Amendment. *Id.*, at 466.

This case differs from *Estelle* in several respects. First, the defendant in *Estelle* had not placed his mental condition at issue, *id.*, at 457, n. 1, whereas Penry himself made his mental status a central issue in both the 1977 rape case and his trials for Pamela Carpenter's rape and murder. Second, in *Estelle*, the trial court had called for the competency evaluation and the State had chosen the examining psychiatrist. *Id.*, at 456—457. Here, however, it was Penry's own counsel in the 1977 case who requested the psychiatric exam performed by Dr. Peebles. Third, in *Estelle*, the State had called the psychiatrist to testify as a part of its affirmative case. *Id.*, at 459. Here, it was during the cross-examination of Penry's own psychological witness that the prosecutor elicited the quotation from the Peebles report. And fourth, in *Estelle*, the defendant was charged with a capital crime at the time of his competency exam, and it was thus clear that his future dangerousness would be a specific issue at sentencing. Penry, however, had not yet murdered Pamela Carpenter at the time of his interview with Dr. Peebles.

We need not and do not decide whether these differences affect the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent. 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. V). We think it was not. The differences between this case and *Estelle* are substantial, and our opinion in *Estelle* suggested that our holding was limited to the "distinct circumstances" presented there. It also indicated that the Fifth Amendment analysis might be different where a defendant "intends to introduce psychiatric evidence at the penalty phase." 451 U.S., at 472. Indeed, we have never extended *Estelle*'s Fifth Amendment holding beyond its particular facts. Cf., e.g., *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (*Estelle* does not apply, and it does not violate the Fifth Amendment, where a prosecutor uses portions of a psychiatric evaluation requested by a defendant to rebut psychiatric evidence presented by the defendant at trial). We therefore cannot say that it was objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim.

Even if our precedent were to establish squarely that the prosecution's use of the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, that error would justify overturning Penry's sentence only if Penry could establish that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We think it unlikely that Penry could make such a showing.

The excerpt from the Peebles report bolstered the State's argument that Penry posed a future danger, but it was neither the first nor the last opinion the jury heard on that point. Four prison officials testified that they were of the opinion that Penry "would commit criminal acts of violence that would constitute a continuing threat to society." App. 94, 104, 138; 47 Record 970. Three psychiatrists testified that Penry was a dangerous individual and likely to remain so. Two were the State's own witnesses. See App. 487, 557. The third was Dr. Price—the same defense witness whom the prosecutor had asked to read from the Peebles report. Before that recitation, Dr. Price had stated his own opinion that "[i]f [Penry] was in the free world, I would consider him dangerous." *Id.*, at 392.

00160

v. JOHNSON

<http://supra.law.cornell.edu/supct/html/00-6677.ZO.html>

While the Peebles report was an effective rhetorical tool, it was by no means the key to the State's case on the question whether Penry was likely to commit future acts of violence. We therefore have considerable doubt that the admission of the Peebles report, even if erroneous, had a "substantial and injurious effect" on the verdict. *Brecht v. Abrahamson*, *supra*, at 637. Accordingly, we will not disturb the Texas Court of Criminal Appeals' rejection of Penry's Fifth Amendment claim.

B

Penry also contends that the jury instructions given at his second sentencing hearing did not comport with our holding in *Penry I* because they did not provide the jury with a vehicle for expressing its reasoned moral response to the mitigating evidence of Penry's mental retardation and childhood abuse. The Texas Court of Criminal Appeals disagreed. The court summarized *Penry I* as holding that when a defendant proffers "mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues ... the jury must be given a special instruction in order to allow it to consider and give effect to such evidence." 903 S. W. 2d, at 765. The court then stated that the supplemental jury instruction given at Penry's second sentencing hearing satisfied that mandate. *Ibid*.

The Texas court did not make the rationale of its holding entirely clear. On one hand, it might have believed that *Penry I* was satisfied merely by virtue of the fact that a supplemental instruction had been given. On the other hand, it might have believed that it was the substance of that instruction which satisfied *Penry I*.

While the latter seems to be more likely, to the extent it was the former, the Texas court clearly misapprehended our prior decision. *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence." 492 U.S., at 319 (emphasis added). See also *Johnson v. Texas*, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting) ("[A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S., at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence," *id.*, at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976)).

The State contends that the substance of the supplemental instruction satisfied *Penry I* because it provided the jury with the requisite vehicle for expressing its reasoned moral response to Penry's particular mitigating evidence. Specifically, the State points to the admittedly "less than artful" portion of the supplemental instruction which says:

"If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues*." App. 675 (emphasis added). See also Brief for Respondent 16.

We see two possible ways to interpret this confusing instruction. First, as the portions italicized above indicate, it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I*. As we made clear in *Penry I*, none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to the evidence of Penry's mental retardation and childhood abuse. Cf. 492 U.S., at 322—325. In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was

00161

v. JOHNSON

<http://supp.law.cornell.edu/supct/html/00-6677.ZO.html>

still “shackled and confined within the scope of the three special issues.” 215 F.3d, at 514 (dissenting opinion). Thus, because the supplemental instruction had no practical effect, the jury instructions at Penry’s second sentencing were not meaningfully different from the ones we found constitutionally inadequate in *Penry I*.

Alternatively, the State urges, it is possible to understand the supplemental instruction as informing the jury that it could “simply answer one of the special issues ‘no’ if it believed that mitigating circumstances made a life sentence ... appropriate ... regardless of its initial answers to the questions.” Brief for Respondent 16. The Texas Court of Criminal Appeals appeared to understand the instruction in this sense, when it termed the supplemental instruction a “nullification instruction.” 903 S. W. 2d, at 765. Even assuming the jurors could have understood the instruction to operate in this way, the instruction was not as simple to implement as the State contends. Rather, it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation.

The jury was clearly instructed that a “yes” answer to a special issue was appropriate only when supported “by the evidence beyond a reasonable doubt.” App. 672. A “no” answer was appropriate only when there was “a reasonable doubt as to whether the answer to a Special Issue should be ... ‘Yes.’ ” *Id.*, at 673. The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury’s two choices with respect to each special issue. The jury could swear that it had unanimously determined “beyond a reasonable doubt that the answer to this Special Issue is ‘Yes.’ ” *Id.*, at 676–678. Or it could swear that at least 10 jurors had “a reasonable doubt as to the matter inquired about in this Special Issue” and that the jury thus had “determin[ed] that the answer to this Special Issue is ‘No.’ ” *Ibid.* (emphasis added).

In the State’s view, however, the jury was also told that it could ignore these clear guidelines and—even if there was in fact no reasonable doubt as to the matter inquired about—answer any special issue in the negative if the mitigating circumstances warranted a life sentence. In other words, the jury could change one or more truthful “yes” answers to an untruthful “no” answer in order to avoid a death sentence for Penry.

We generally presume that jurors follow their instructions. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Here, however, it would have been both logically and ethically impossible for a juror to follow both sets of instructions. Because Penry’s mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a “true verdict.” Tex. Crim. Proc. Code Ann., Art. 35.22 (Vernon 1989).

The mechanism created by the supplemental instruction thus inserted “an element of capriciousness” into the sentencing decision, “making the jurors’ power to avoid the death penalty dependent on their willingness” to elevate the supplemental instruction over the verdict form instructions. *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion). There is, at the very least, “a reasonable likelihood that the jury ... applied the challenged instruction in a way that prevent[ed] the consideration” of Penry’s mental retardation and childhood abuse. *Boyde v. California*, 494 U.S. 370, 380 (1990). The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry’s mitigating evidence.

Even though the Texas Court of Criminal Appeals focused solely on the supplemental instruction in affirming Penry’s sentence, the State urges us to evaluate the instruction contextually, with reference to the comments of the prosecutor and defense counsel, as well as the comments of the court during *voir dire*. Indeed, we have said that we will approach jury instructions in the same way a jury would—with a “commonsense understanding of the instructions in the light of all that has taken place at the trial.” *Id.*, at 381. *Penry I* itself illustrates this methodology, as there we evaluated the likely effect on the jury of the comments of the defense counsel and prosecutor. 492 U.S., at 325–326. As we did there, however, we conclude that these comments were insufficient to clarify the confusion caused by the instructions

00162

v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZO.html>

themselves.

Voir dire was a month-long process, during which approximately 90 prospective jurors were interviewed. See 3 Record (index of transcripts). Many of the veniremembers—including each of the 12 jurors who was eventually empaneled—received a copy of an instruction largely similar to the supplemental instruction ultimately given to the jury. After each juror read the instruction, the judge attempted to explain how it worked. See, e.g., 18 Record 966–967 (“[I]f you thought the mitigating evidence was sufficient ... you might, even though you really felt those answers [to the three special issues] should be yes, you might answer one or more of them no ... so [Penry] could get the life sentence rather than the death penalty”). The prosecutor then attempted to explain the instruction. See, e.g., *id.*, at 980 (“[E]ven though [you] believe all three of these answers are yes, [you] don’t think the death penalty is appropriate for this particular person because of what has happened to him in the past [The] instruction is to give effect to that belief and answer one or all of these issues no”). And with most of the jurors, defense counsel also gave a similar explanation. See, e.g., *id.*, at 1018 (“[I]f you believe[d] [there] was a mitigating circumstance ... you [could] apply that mitigation to answer—going back and changing an answer from yes to a no”).

While these comments reinforce the State’s construction of the supplemental instruction, they do not bolster our confidence in the jurors’ ability to give effect to Penry’s mitigating evidence in deciding his sentence. Rather, they highlight the arbitrary way in which the supplemental instruction operated, and the fact that the jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.

Moreover, we are skeptical that, by the time their penalty phase deliberations began, the jurors would have remembered the explanations given during *voir dire*, much less taken them as a binding statement of the law. *Voir dire* began almost two full months before the penalty phase deliberations. In the interim, the jurors had observed the rest of *voir dire*, listened to a 5-day guilt-phase trial and extensive instructions, participated in 2½ hours of deliberations with respect to Penry’s guilt, and listened to another 5-day trial on punishment. The comments of the court and counsel during *voir dire* were surely a distant and convoluted memory by the time the jurors began their deliberations on Penry’s sentence.

The State also contends that the closing arguments in the penalty phase clarified matters. Penry’s counsel attempted to describe the jury’s task:

“If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, ... then, you get to answer one of ... those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow and the law does funny things sometimes.” App. 640.

Again, however, this explanation only reminded the jurors that they had to answer the special issues dishonestly in order to give effect to Penry’s mitigating evidence. For the reasons discussed above, such a “clarification” provided no real help. Moreover, even if we thought that the arguments of defense counsel could be an adequate substitute for statements of the law by the court, but see *Boyde v. California*, *supra*, at 384, the prosecutor effectively neutralized defense counsel’s argument, as did the prosecutor in *Penry I*, by stressing the jury’s duty “[t]o follow your oath, the evidence and the law.” App. 616. At best, the jury received mixed signals.

Our opinion in *Penry I* provided sufficient guidance as to how the trial court might have drafted the jury charge for Penry’s second sentencing hearing to comply with our mandate. We specifically indicated that our concerns would have been alleviated by a jury instruction defining the term “deliberately” in the first special issue “in a way that would clearly direct the jury to consider fully Penry’s mitigating evidence as it bears on his personal culpability.” 492 U.S., at 323. The trial court surely could have drafted an instruction to this effect. Indeed, Penry offered two definitions of “deliberately” that the trial court refused to give. See Tr. of Oral Arg. 12, 14–15.

A clearly drafted catchall instruction on mitigating evidence also might have complied with *Penry I*.

00163

v. JOHNSON

<http://supp.law.cornell.edu/supct/html/00-6677.ZO.html>

Texas' current capital sentencing scheme (revised after Penry's second trial and sentencing) provides a helpful frame of reference. Texas now requires the jury to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Code Crim. Proc., Art. 37.071(2)(e)(1) (Vernon Supp. 2001).^{*} Penry's counsel, while not conceding the issue, admitted that he "would have a tough time saying that [Penry I] was not complied with under the new Texas procedure." Tr. of Oral Arg. 16. At the very least, the brevity and clarity of this instruction highlight the confusing nature of the supplemental instruction actually given, and indicate that the trial court had adequate alternatives available to it as it drafted the instructions for Penry's trial.

Thus, to the extent the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at Penry's second sentencing hearing satisfied our mandate in *Penry I*, that determination was objectively unreasonable. Cf. *Shafer v. South Carolina*, 532 U.S. ____ (2001) (slip op., at 2, 12) (holding on direct review that the South Carolina Supreme Court "incorrectly limited" our holding in *Simmons v. South Carolina*, 512 U.S. 154 (1994), because the court had mischaracterized "how the State's new [capital sentencing] scheme works"). The three special issues submitted to the jury were identical to the ones we found constitutionally inadequate as applied in *Penry I*. Although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical. The comments of the court and counsel accomplished little by way of clarification. Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion we reached in *Penry I*: "[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." 492 U.S., at 326.

The judgment of the United States Court of Appeals for the Fifth Circuit is therefore affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes

^{*} Another recent development in Texas is the passage of a bill banning the execution of mentally retarded persons. See Babineck, *Perry: Death-penalty measure needs analyzing*, Dallas Morning News, May 31, 2001, p. 27A. As this opinion goes to press, Texas Governor Rick Perry is still in the process of deciding whether to sign the bill. *Ibid*.

v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZX.html>



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| v. JOHNSON (00-6677) | | |
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| 215 F.3d 504, affirmed in part, reversed in part, and remanded. | | |
| Syllabus | Opinion [O'Connor] | Other [Thomas] |
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Opinion of Thomas, J.

SUPREME COURT OF THE UNITED STATES

No. 00—6677

JOHNNY PAUL PENRY, PETITIONER v. GARY L.
JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 4, 2001]

Justice Thomas, with whom The Chief Justice and Justice Scalia join, concurring in Parts I, II, and III—A, and dissenting in Part III—B.

Two Texas juries have now deliberated and reasoned that Penry's brutal rape and murder of Pamela Carpenter warrants the death penalty under Texas law. And two opinions of this Court have now overruled those decisions on the ground that the sentencing courts should have said more about Penry's alleged mitigating evidence. Because I believe the most recent sentencing court gave the jurors an opportunity to consider the evidence Penry presented, I respectfully dissent.

As a habeas reviewing court, we are not called upon to propose what we believe to be the ideal instruction on how a jury should take into account evidence related to Penry's childhood and mental status. Our job is much simpler, and it is significantly removed from writing the instruction in the first instance. We must decide merely whether the conclusion of the Texas Court of Criminal Appeals—that the sentencing court's supplemental instruction explaining how the jury could give effect to any mitigating value it found in Penry's evidence satisfied the requirements of *Penry I*—was "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000). See also 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. V).

At Penry's first sentencing, the court read to the jury Texas' three special issues for capital sentencing.¹ The court did not instruct the jury that "it could consider the evidence offered by Penry as

00165

v. JOHNSON

<http://supra.law.cornell.edu/supct/html/00-6677.ZX.html>

mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence.” 492 U.S., at 320. The prosecutor also did not offer any way for the jury to give mitigating effect to the evidence, but instead simply reiterated that the jury was to answer the three questions and follow the law. In *Penry I*, this Court concluded that, “[i]n light of the prosecutor’s argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” *Id.*, at 326.

At Penry’s second sentencing, the court read to the jury the same three special issues. In contrast to the first sentencing, however, the court instructed the jury at length that it could consider Penry’s proffered evidence as mitigating evidence and that it could give mitigating effect to that evidence. See *ante*, at 5–6. The Texas Court of Criminal Appeals concluded that this supplemental instruction “allow[ed] [the jury] to consider and give effect to” Penry’s proffered mitigating evidence and therefore was “sufficient to meet the constitutional requirements of [*Penry I*].”² *Penry v. State*, 903 S. W. 2d 715, 765 (1995). In my view, this decision is not only objectively reasonable but also compelled by this Court’s precedents and by common sense.

“In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a ‘commonsense understanding of the instructions in the light of all that has taken place at the trial.’ ” *Johnson v. Texas*, 509 U.S. 350, 368 (1993) (quoting *Boyde v. California*, 494 U.S. 370, 381 (1990)). The Texas court’s instruction, read for common sense, or, even after a technical parsing, tells jurors that they may consider the evidence Penry presented as mitigating evidence and that, if they believe the mitigating evidence makes a death sentence inappropriate, they should answer “no” to one of the special issues. Given this straightforward reading of the instructions, it is objectively reasonable, if not eminently logical, to conclude that a reasonable juror would have believed he had a “vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” 492 U.S., at 326.

It is true that Penry’s proffered evidence did not fit neatly into any of the three special issues for imposing the death penalty under Texas law.³ But the sentencing court told the jury in no uncertain terms precisely how to follow this Court’s directive in *Penry I*. First, the sentencing court instructed the jury that it could consider such evidence to be mitigating evidence. See App. 675 (“[W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant’s character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case”). Next, the court explained to the jury how it must give effect to the evidence. *Ibid.* (“If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant’s personal culpability at the time you answer the special issue”). And finally, the court unambiguously instructed: “If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.” *Ibid.* (emphasis added). Without performing legal acrobatics, I cannot make the instruction confusing. And I certainly cannot do the contortions necessary to find the Texas appellate court’s decision “objectively unreasonable.”⁴ I simply do not share the Court’s confusion as to how a juror could consider mitigating evidence, decide whether it makes a death sentence inappropriate, and respond with a “yes” or “no” depending on the answer.

Curiously, this Court concludes that the supplemental instruction “inserted ‘an element of capriciousness’ into the sentencing decision, ‘making the jurors’ power to avoid the death penalty dependent on their willingness’ to elevate the supplemental instruction over the verdict form instructions.” *Ante*, at 16 (quoting *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (plurality opinion)). Any reference to *Roberts*, however, is wholly misplaced. *Roberts* involved a situation in which the jury was told to find the defendant guilty of a lesser included offense, unsupported by any evidence, if the

00166

v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZX.html>

jury did not want him to be sentenced to death. *Id.*, at 334—335. In Penry's case there was no suggestion, express or implied, made to the jury that it could *disregard* the evidence. On the contrary, it was instructed on how to *give effect* to Penry's proffered evidence, as required by this Court in *Penry I*. Tellingly, the *Roberts* plurality stated in full that "[t]here is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to *disregard the trial judge's instructions*." 428 U.S., at 335 (emphasis added). In Penry's case, the judge's instructions included an explanation of how to answer the three special issues and how to give effect to the mitigating evidence.

Finally, contrary to the Court's claim that the jury received "mixed signals," *ante*, at 18, it appears that it is the Texas courts that have received the mixed signals. In *Jurek v. Texas*, 428 U.S. 262 (1976), this Court upheld the Texas sentencing statute at issue here against attack under the Eighth and Fourteenth Amendments. The joint opinion in *Jurek* concluded that the statute permits the jury "to consider whatever evidence of mitigating circumstances the defense can bring before it" and "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.*, at 273—274 (opinion of Stewart, Powell, and Stevens, JJ.). Then, while purporting to distinguish, rather than to overrule, *Jurek*, this Court in *Penry I* determined that the same Texas statute was constitutionally insufficient by not permitting jurors to give effect to mitigating evidence. 492 U.S., at 328. See also *id.*, at 355—356 (Scalia, J., dissenting) (explaining how *Penry I* contradicts *Jurek*'s conclusions). According to the Court, an instruction informing the jury that it could give effect to the mitigating evidence was necessary. 492 U.S., at 328. And in today's decision, this Court yet again has second-guessed itself and decided that even this supplemental instruction is not constitutionally sufficient.

Notes

1. The special issues are: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Penry I*, 492 U.S. 302, 310 (1989) (quoting Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Supp. 1989)).

2. This Court's suggestion that the Texas court may have believed that any supplemental instruction, regardless of its substance, would satisfy *Penry I*'s requirement, see *ante*, at 12, is specious. The Texas court explained that a "jury must be given a special instruction *in order to allow it to consider and give effect to such evidence*;" it quoted the full text of the supplemental instruction; and it concluded that "a nullification instruction *such as this one* is sufficient to meet the constitutional requirements of [*Penry I*]." 903 S. W. 2d, at 765 (emphasis added). It is quite obvious that the court based its legal conclusion on the content of the supplemental instruction.

3. I am still bewildered as to why this Court finds it unconstitutional for Texas to limit consideration of mitigating evidence to those factors relevant to the three special issues. See *Graham v. Collins*, 506 U.S. 461, 478 (1993) (Thomas, J., concurring). But we need not address this broader issue to uphold Penry's sentence.


4. I think we need not look beyond the court's instructions in evaluating the Texas appellate court's decision. But even if there were any doubt as to whether the instruction led the jurors to believe there was a vehicle for giving mitigating effect to Penry's evidence, the instruction was made clear "in the light of all that ha[d] taken place at the trial." *Johnson v. Texas*, 509 U.S. 350, 368 (1993). The judge and prosecutor fully explained how to give effect to mitigating evidence during the *voir dire* process, and defense counsel made the instruction clear in closing: "[i]f, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence,

00167

v. JOHNSON

<http://supct.law.cornell.edu/supct/html/00-6677.ZX.html>

... then, you get to answer one of ... those questions no," App. 640. Even if the jurors had forgotten what they had been told at *voir dire*, see *ante*, at 17—18, an assumption that I find questionable given our presumptions about jurors' ability to remember and follow instructions, see, e.g., *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), the defense counsel's explanation from closing arguments would have been fresh on their minds. Despite the Court's assertion that defense counsel told the jurors to answer the questions dishonestly, *ante*, at 18, it seems to me that the jurors reasonably could have believed that they could honestly answer any question "no" if they found that the death sentence would be inappropriate given the mitigating evidence. They could follow their "oath, the evidence and the law," *ibid.*, (quoting the prosecutor's statement, App. 616), by truthfully concluding that the evidence of Penry's childhood and mental status did not warrant the death penalty and by writing "no" next to one of the special issues.



00168

Page 1

IN THE 194TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

THE STATE OF TEXAS :
VS. : CAUSE NO. F00-02424-M
JEDIDIAH ISAAC MURPHY :

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, Jedidiah Isaac Murphy, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 4th day of October, 2000, in Dallas County, Texas.

To this charge the defendant has pleaded not guilty.

You are instructed that the law applicable to this case is as follows:

A person commits the offense of murder if he: (1) intentionally or knowingly causes the death of an individual; or (2) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

You are instructed that the phrase "specific intent to kill" or the "specific intention of killing" means that it was the defendant's conscious objective or desire to cause the

00169

Page 2

death of the deceased.

A person commits the offense of capital murder when the person intentionally commits murder as defined above during the course of committing or attempting to commit the offense of robbery.

A person commits the offense of capital murder when the person intentionally commits murder as defined above during the course of committing or attempting to commit the offense of kidnapping.

For Jedidiah Isaac Murphy to be convicted of capital murder in this case, it must be proved beyond a reasonable doubt that he had the specific intent to kill Bertie Cunningham by shooting her with a firearm, a deadly weapon, and that he intentionally caused the death of Bertie Cunningham while in the course of committing or attempting to commit robbery and/or kidnapping of Bertie Cunningham.

If it is found beyond a reasonable doubt that the defendant intentionally caused the death of Bertie Cunningham by shooting her with a firearm, a deadly weapon, but it is not found beyond a reasonable doubt that the defendant intentionally caused the death of Bertie Cunningham while in the course of committing or attempting to commit robbery and/or kidnapping of Bertie Cunningham, then the defendant cannot be found guilty of capital murder.

A person commits the offense of kidnapping if he

00170

Page 3

intentionally or knowingly abducts another person.

The term "abduct" means to restrain a person with intent to prevent her liberation by (a) secreting or holding her in a place where she is not likely to be found; or (b) using or threatening to use deadly force.

The term "restrain" means to restrict a person's movements without consent, so as to interfere substantially with her liberty, by moving her from one place to another or by confining her. Restraint is without consent if it is accomplished by force, intimidation, or deception.

A person commits the offense of robbery if, in the course of committing theft and with intent to obtain or maintain control of the property of another, he intentionally, knowingly or recklessly causes bodily injury to another.

A person commits the offense of theft if with intent to deprive the owner of property he appropriates the property unlawfully.

The term, "in the course of committing theft," means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

An "attempt" to commit an offense occurs where one, with specific intent to commit an offense, does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

00171

Page 6

from the standard of care than an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Intent may be inferred from acts done, words spoken, or both.

You may consider all relevant facts and circumstances surrounding the killing and any previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

A person is criminally responsible if the result would not have occurred but for his conduct and if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different offense was committed.

An allegation that an offense occurred "on or about" a certain date allows proof that the offense occurred any time before the presentment of the indictment and within the statute of limitations. The indictment in this case was presented on December 7th, 2000. There is no time limitation in prosecutions for capital murder, murder, or manslaughter.

The term "intoxication" means the disturbance of mental or physical capacity resulting from the introduction of any substance into the body. You are instructed that voluntary intoxication does not constitute a defense to the commission of

00174

Page 7

a crime.

You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the knowledge or intent of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment in this case, and for no other purpose.

You are instructed that a witness may be impeached by showing that he has previously been convicted of a felony offense or a crime involving moral turpitude. Such impeachment evidence may be considered by you to aid you in determining (if it does so) the weight, if any, to be given the testimony of the witness at trial and his credibility.

"You are instructed that under our law a statement or confession of a defendant made while he was in jail or other place of confinement, or in the custody of an officer, shall be admitted in evidence if it appears that the same was freely and voluntarily made without compulsion or persuasion.

Now, If you find from the evidence, or you have a reasonable doubt thereof, that at the time of the statement of

Page 8

the defendant in this case, if such statement there was, to Officer Jason Bonham and/or M.J. Myers, the defendant was under the influence of alcohol and/or marijuana to such extent as to be reduced to a condition of mental impairment such as to render his statement not wholly voluntary, then such statement would not be freely and voluntarily made, and in such case you will wholly disregard the alleged statement referred to and not consider it for any purpose nor any evidence obtained as a result of such oral or written statement.

You are instructed that under our law a written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show that the accused has been warned prior to making such statement or confession, by the person to whom the same is made that;

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial; and

(2) any statement he makes may be used as evidence against him in court; and

(3) he has the right to have a lawyer present to advise him prior to and during any questioning; and

00176

Page 9

(4) he may have his own lawyer, or, if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview or questioning at any time.

Now, in this case, if you find and believe from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged written statement or confession to M.J. Myers, if he did give it, the said M.J. Myers did not warn the defendant in the respects just outlined, or as to any one of such requirements just outlined, or that the confession was not freely and voluntarily made without compulsion or persuasion, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warnings were given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever

00177

Page 10

or any evidence obtained as a result of same.

You are instructed that under our law an oral confession of a defendant made while he was in jail or in custody of an officer and while under interrogation shall be admissible in evidence if it appears that the same was freely and voluntarily made without compulsion or persuasion. However, before a confession made orally to officers may be considered voluntary, it must be shown by evidence beyond a reasonable doubt that, prior to make such oral statement, the accused has been warned by the person to whom the statement is made, or by a magistrate, that;

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial; and

(2) any statement he makes may be used as evidence against him in court; and

(3) he has the right to have a lawyer present to advise him prior to and during any questioning; and

(4) he may have his own lawyer, or, if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview or questioning at any time.

So, in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the

00178

Page 11

defendant gave the alleged oral statement or confession to Jason Bonham, if he did give it, the said Gary Rose did not warn defendant in the respects enumerated above, or as to any one of such requirements, then you will wholly disregard the alleged confession or statement and not consider it or any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to making such statement, if he did, the defendant knowingly, intelligently and voluntarily waived the rights hereinbefore set out in the warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of the statement, if any.

Venue is the county where the prosecution of a criminal offense is begun and tried. You are further charged as the law in this case that the venue for the trial of the offense of capital murder is proper in one of the following counties:

- (1) in the county in which the offense was committed, or
- (2) where property is stolen in one county and removed by the offender to another county, in the county where the

00179

Page 12

defendant took the property or in any other county through or into which he may have removed the same, or

(3) if a person receives an injury in one county and dies in another by reason of such injury, in the county where the injury was received or where the death occurred, or in the county where the dead body is found, or

(4) in the county in which the kidnapping offense was committed, or in any county through, into, or out of which the person kidnapped may have been taken.

However, if an offense has been committed within this State and it cannot readily be determined within which county or counties the commission took place, trial may be held in the county in which the defendant resides, in the county in which he was apprehended, or in the county to which he was extradited.

The burden of proof is on the State to prove venue by a preponderance of the evidence.

The term "preponderance of the evidence" means the greater weight of the credible evidence.

Now, therefore, if you find from the evidence that the State has proved venue as alleged by a preponderance of the evidence, you will next consider whether the State has proved the elements of the offense as set out below.

If you do not so find and believe by a preponderance of the evidence then you will find the defendant not guilty and

00180

Page 13

so say by your verdict.

Now, therefore, if you find from the evidence beyond a reasonable doubt that on or about the 4th day of October, 2000, the defendant, Jedidiah Isaac Murphy, did unlawfully then and there intentionally cause the death of Bertie Cunningham, an individual, hereinafter called deceased, by shooting the said deceased with a firearm, a deadly weapon, and the defendant intentionally did cause the death of the deceased while the said defendant was in the course of committing or attempting to commit the offense of robbery and/or kidnapping of the deceased, you will find the defendant guilty of capital murder, as charged in the indictment.

If you do not so believe, or if you have a reasonable doubt thereof, you will next consider whether the defendant is guilty of murder, as included in the indictment.

A person commits the offense of murder as previously defined.

If you find and believe from the evidence beyond a reasonable doubt that the defendant, Jedidiah Isaac Murphy, on or about October 4th, 2000, intentionally or knowingly caused the death of Bertie Cunningham, an individual by shooting the said deceased with a firearm, a deadly weapon, you find the defendant guilty of murder as included in the indictment, or, if you find and believe from the evidence beyond a reasonable doubt that the defendant, Jedidiah Isaac Murphy, on or about

00181

Page 14

October 4th, 2000, committed or attempted to commit a felony, robbery and/or kidnapping, and in the course of, and in furtherance of, the commission or attempt to commit robbery and/or kidnapping to Bertie Cunningham, Jedidiah Isaac Murphy committed an act clearly dangerous to human life by shooting the said Bertie Cunningham in the head with a firearm, a deadly weapon, and thereby cause the death of Bertie Cunningham, an individual, you will find the defendant guilty of murder, as included in the indictment.

If you do not so find, or if you have a reasonable doubt thereof, you will next consider whether the defendant is guilty of manslaughter, as included in the indictment.

A person commits the offense of manslaughter if he recklessly causes the death of an individual.

If you find and believe from the evidence beyond a reasonable doubt that Jedidiah Isaac Murphy, on or about the 4th day of October, 2000, recklessly caused the death of Bertie Cunningham by shooting her in the head with a firearm, a deadly weapon, you will find the defendant guilty of manslaughter, as included in the indictment.

If you do not so find, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

If you find and believe from the evidence beyond a reasonable doubt that the defendant is guilty of capital murder, as charged in the indictment, or murder, or

00182

Page 15

manslaughter, as included in the indictment, but you have a reasonable doubt as to which offense the defendant is guilty, you will resolve such doubt in the defendant's favor and find him guilty of manslaughter as included in the indictment.

If you have a reasonable doubt as to whether defendant is guilty of any offense defined in this charge, then you should acquit the defendant and say by your verdict, "Not Guilty."

In all criminal cases the burden of proof is on the State.

At times throughout the trial the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what

Page 16

you may think or surmise the opinion of the Court to be. The Court has no right by any word or any act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. Venue is not an element of the offense and must be proved by a preponderance of the evidence. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant. Venue is not

00184

Page 17

an element of the offense and must be proved by a preponderance of the evidence.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty".

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

You have been permitted to take notes during the testimony in this case. In the event any of you took notes,

Page 18

you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in

Page 19

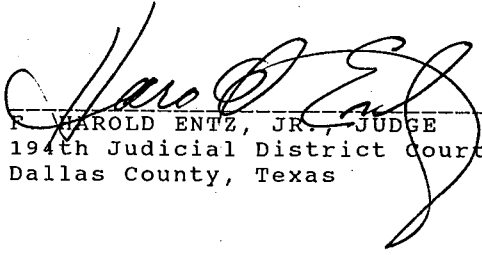
this case.

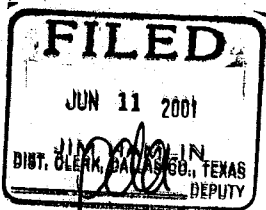
After you retire to the jury room, you will select one of your members as your presiding juror. It is the presiding juror's duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and signing the same as presiding juror.

After you retire to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must neither consider, discuss, nor relate any matters not in evidence before you. You should neither consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

Page 20

After you have retired, you may communicate with this Court in writing through the bailiff who has you in charge. Your written communication must be signed by the presiding juror. Do not attempt to talk to the bailiff, the attorneys, or the Court regarding any question you may have concerning the trial of the case. After you have reached a unanimous verdict or if you desire to communicate with the Court, please use the jury call button on the wall and one of the bailiffs will respond.


F. HAROLD ENTZ, JR., JUDGE
194th Judicial District Court
Dallas County, Texas



00188

Page 21

V E R D I C T F O R M S

We, the jury, find the Defendant, Jedidiah Isaac Murphy,
guilty of capital murder, as charged in the Indictment.

Nichole Marie Briscoe
Presiding Juror
PRINTED NAME: Nichole Marie Briscoe

-OR-

We, the jury, find the Defendant, Jedidiah Isaac Murphy,
guilty of murder, as included in the Indictment.

Presiding Juror
PRINTED NAME: _____

-OR-

We, the jury, find the Defendant, Jedidiah Isaac Murphy,
guilty of manslaughter, as included in the Indictment.

Presiding Juror
PRINTED NAME: _____

-OR-

We, the jury, find the Defendant, Jedidiah Isaac
Murphy, not guilty.

Presiding Juror
PRINTED NAME: _____

00189

Can we please have Wilhelm
line up & August photo
brought be Chelsea.

Nicole Biscoe

DEPUTY
DALLAS CO. CLERK
JIM HAMILIN

2001 JUN 30 PM 12:06

FILED

00190

THE STATE OF TEXAS

V.

JEDIDIAH ISAAC MURPHY

FILED
F00-02424-U
2001 JUN 26 AM 9:51

IN THE 194TH JUDICIAL

DISTRICT COURT OF

DALLAS COUNTY, TEXAS

**MOTION FOR MISTRIAL BASED ON UNCONSTITUTIONAL
APPLICATION OF PROSECUTORIAL DISCRETION IN DEATH PENALTY CASES
IN DALLAS COUNTY**

TO THE JUDGE OF THIS HONORABLE COURT:

COMES NOW, Defendant in the above entitled and numbered cause and presents in and to this Court his Motion for Mistrial Based on the Unconstitutional Application of Prosecutorial Discretion in Death Penalty Cases in Dallas County, and in support of this motion would present the following:

I.

Defendant has been found guilty of capital murder by a jury. The State has indicated that it intends to seek the death penalty against the Defendant.

II.

On numerous occasions, counsel for Defendant has offered a plea agreement with the State of Texas, represented by Greg Davis. Those negotiations have included an offer from the defense to plead guilty to two offenses, capital murder and aggravated robbery, to be served *consecutively*, one after another, resulting in Defendant serving a capital murder life sentence (forty calendar years before considered for parole) *and* an aggravated life sentence (thirty calendar years before considered for parole) resulting in seventy calendar years before defendant

would be considered for parole. On each occasion, the prosecutor, Greg Davis, has rejected the offer.

III.

On Friday, June 22, 2001, George West, chief felony prosecutor in Dallas County, entered into a plea agreement with DeMarcus Kennard Joe, a man accused of the bludgeoning death of Me Hyee Lee, aged 66 and her son Houng Sae Lee, aged 36, where Mr. Joe pled guilty in exchange for consecutive live prison sentences. (See Defense Exhibit A, a copy of the article regarding the offense in the June 23, 2001 edition of *The Dallas Morning News*). Ms. Lee and her son were bound and gagged in their DeSoto Home, beaten with a hammer and Mrs. Lee had been sexually assaulted. Mr. Joe confessed to the murders. An examination of Dallas County Criminal Records shows that Mr. Joe was on community supervision at the time of the capital murder; his probation was dismissed as a part of the plea bargain. (See Defense Exhibit B, a copy of the "JI55" printout from the Dallas County Computer).

Defendant in this case was accused and convicted of the killing of Bertie Lee Cunningham, an 80-year-old woman, by shooting her in the head during the course of a kidnaping or a robbery. Defendant admitted to killing Ms. Cunningham, but stated in his Voluntary Statement (and many times prior to and following that statement) that the shooting was an accident. nningham was not bound or tortured. Ms. Cunningham was not sexually assaulted. Additionally, Ms. Cunningham was the only victim in the offense. Moreover, Defendant, like Mr. Joe, was on probation for the State Jail Felony Offense of Unauthorized Use of a Motor Vehicle at the time of this offense. Defendant was also on probation out of another county for the felony offense of Burglary of a Habitation.

IV.

The Dallas County District Attorney's Office is also in the process of prosecuting the infamous "Texas 6", six inmates from a Texas state penitentiary who escaped from that facility and traveled to Dallas where they are accused of killing an Irving police officer during the course of a robbery of an Oshmans Sporting Goods Store. Allegedly, two of the accused "Texas 6" were merely present at the robbery and had no part in the killing of the police officer. The Dallas County District Attorney's Office is treating all the defendants the same, seeking the death penalty against each defendant, without regard to the actions of the individual defendants.

V.

Further still, the Dallas County District Attorney's Office routinely decides not to seek the death penalty, regardless of the heinous nature of the offense, if the victim has a criminal record or is not of sound character. Undersigned counsel has personally participated in one such case, defending the accused in the case of *The State of Texas v. Kerry Cheatham*, cause number F99-00536-U. Mr. Cheatham and his co-defendants, Roderick Earl and Rodney Else, were convicted of capital murder and sentenced to life confinement in the penitentiary because the State of Texas, represented by the Dallas County District Attorney's Office, did not seek the death penalty. Mr. Cheatham and his co-defendants were accused and convicted of kidnaping two men after a drug deal went bad, tying one man's hands behind his back, beating him severely, putting him in the trunk, taking him to a remote location, pouring gasoline on him and setting him afire, all while the other victim watched. The burning victim lived long enough to stand, walk to a nearby street and flag down a motorist who called 911. The victim waited for police and medical help while his burnt skin began dropping from his fingers and feet. He was

transported to the hospital where he lived for approximately 18 hours, begging for the doctors to help him and keep him alive. He did not survive the attack.

VI.

Defendant asserts that the facts stated, above, shows that the Dallas County District Attorney's Office decides which cases to prosecute for the death penalty in an arbitrary and capricious manner, violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, the Dallas County District Attorney's Office is not applying the laws of the State of Texas equally to all persons accused of the offense of Capital Murder, and thus is prosecuting Defendant in violation of the Equal Protection and Due Process Clauses of the United States Constitution. As such, Defendant would ask this Court to order the Dallas County District Attorney's Office to show, through evidence and testimony, why this case is any more deserving of the death penalty than Mr. Joe's capital murder case or any other case in which the State of Texas is *not* seeking the death penalty in a capital murder case. Further, the State of Texas should be ordered to show how Defendant presents more of a "future danger" to society that seeking the death penalty is warranted in this case rather than other cases similarly situated. Moreover, the State of Texas should be ordered to show that sufficient mitigating evidence does not exist, thereby showing that seeking the death penalty is warranted in this case rather than other cases similarly situated. Absent such a showing, Defendant would ask this Court to find that the actions of the Dallas County District Attorney's Office in regard to this case against Jedidiah Isaac Murphy violates the Equal Protection and the Due Process Clauses of the United States Constitution and sentence Defendant to Life Confinement in the penitentiary.

WHEREFORE PREMISES CONSIDERED, Defendant would ask this Court to order a hearing at the earliest date, and, absent a showing by the Dallas County District Attorney's Office that they apply the Texas Capital Murder Statute in a manner that is not violative of the Equal Protection of the United States Constitution, sentence Jedidiah Isaac Murphy to Life Confinement in the Institutional Division of the Texas Department of Criminal Justice.

Respectfully Submitted,

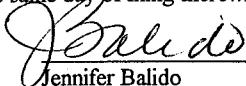


Jennifer Balido
Assistant Public Defender
133 N. Industrial, LB 2
Dallas, Texas 75207
(214) 653-3550
State Bar Number 10474880

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered a copy of the above motion to Greg Davis, Assistant District Attorney of Dallas County, Texas on the same day of filing therewith.


Jennifer Balido

ORDER

Having considered the foregoing motion and arguments of counsel, if any, the Motion is hereby _____ (Granted/ Denied)

This the _____ day of _____, 2001.

Judge Presiding

INSIDE METRO

■ Pro wrestler indicted for manslaughter in woman's death
PAGE 37A

**TEXAS & SOUTHWEST**

■ Navy looks at S. Texas coast as possible replacement for bomb range
PAGE 33A

OVERNIGHT

■ Everything goes right at Ballet Concerto performance
PAGE 39A

Metropolitan

Saturday, June 23, 2001

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dallasnews.com

III — 31 A

Killer bargains for life terms

Plea deal riles victims' family

By Tim Wyatt

Staff Writer

Family members of a mother and a son murdered in DeSoto accused Dallas County prosecutors of abandoning the death-penalty case Friday for a last-minute plea bargain with the 19-year-old confessed killer.

During a 30-minute hearing in state District Judge Faith Johnson's court, Marcus Kennard Joe pleaded guilty to the bludgeoning deaths of Me Hyee Lee, 63, and her son, Hong Sae Lee, 36, in exchange for consecutive life prison sentences.



Marcus Kennard Joe

According to members of the Lee family, lead prosecutor George West backed out of taking the capital murder case to trial, citing a huge workload of death-penalty cases and a lack of evidence to ensure a conviction. Mr. Joe's plea bargain leaves 10 death-penalty cases pending in Dallas County.

Mr. West said the facts of the case warranted the plea bargain, which ensured Mr. Joe would have to serve 70 years before being eligible for parole. District Attorney Bill Hill could not be reached for comment Friday.

Hae-sun Richardson, Mrs. Lee's daughter, said Mr. West told her the district attorney's office was overloaded with capital murder cases because six prison escapees will be tried in the murder of an Irving police officer. She said he also told her that he was concerned whether evidence in the case could bring a conviction.

"I asked him what that meant, and he said to me, 'If he's acquitted, he

Please see KILLER, 38A.

00196

DEFENSE EXH "A" p1

38 A — City Dallas Morning News Saturday, June 23, 2001 III

METROPOLITAN

Killer bargains for 2 life terms; victims' family objects

Continued from Page 31A.

could be eating breakfast at McDonald's the next day," Ms. Richardson said. "I left me with the impression that, if my brother and mother weren't Koreans and living in DeSoto, we would have gotten a better response from the district attorney."

Mr. West said he sympathized with the family. "I understand their feelings," he said. "But my duties as a district attorney are to put my personal feelings aside and go with the facts of the case."

Mr. West would not discuss his conversations with the family and said the cases against two other suspects are still under investigation by his office.

The bodies of Mrs. Lee and her son were discovered bound and gagged in their DeSoto home March 3 after an anonymous caller alerted DeSoto police. The two had been beaten to death with a hammer in separate rooms of the house. Mrs. Lee, the owner of an Oak Cliff dry-cleaning business, had also been sexually assaulted.

A day later, detectives tracked

down two men and a 15-year-old boy who all gave videotaped confessions to the crime. A fourth suspect turned himself in to police the next day and also confessed to a role in the crime, police said.

In May, prosecutors decided to seek the death penalty for two of the suspects, Mr. Joe and 20-year-old Kenneth Dewayne Edwards, both of Dallas. Jacob Cleveland Jackson, 18, was also indicted on capital murder charges, and the 15-year-old boy faces similar charges in juvenile court.

Last week, almost 600 Dallas County residents were summoned for jury selection for Mr. Joe's trial. Individual interviews were slated to begin next month, and it was expected that testimony could begin in late August.

Ms. Richardson said prosecutors left word for her to call them the day before jury selection began and informed her a plea was in the works. When she voiced her family's wishes to take the case to trial, she said Mr. West was hesitant.

"But when the jury selection began the next day, we thought

they had dropped the idea," she said. "Then I got a call yesterday telling me that the plea bargain was going to be signed."

John Richardson, Mrs. Lee's son-in-law, stood up in court to give a victim impact statement after Mr. Joe received his sentences. But instead of addressing Mr. Joe, he turned to Judge John-

son. "I don't agree with the plea bargain," he said. "I don't think this is just."

Brad Lollar, one of three defense attorneys appointed to represent Mr. Joe, said his client

was obviously guilty and had been requesting a plea bargain from prosecutors for weeks. In effect, he said, Mr. Joe received a life sentence without the possibility of parole with the consecutive sentences.

"I congratulate the state for having agreed to the deal, despite the family's objections," Mr. Lollar said. "It was the right thing to do."

Mr. Joe must serve 40 years for the capital murder of Mrs. Lee before he begins serving a minimum of 30 years for the murder of Mr. Lee.

| LN | EXJ156 NAME ENTERED JOE DEMAR | ARC | RS | DOB | CASE/BOND | CT | CHARGE | DISP |
|----|-------------------------------|-----|--------|-----------|-----------------|------|--------|------|
| 01 | JOE DEMARCUS KENARD | BM | 010182 | F-0121550 | FW CAP MUR FEL | PGBC | | |
| 02 | JOE DEMARCUS KENARD | BM | 010182 | F-0121548 | FW CAP MUR MULT | PGBC | | |
| 03 | JOE DEMARCUS KENARD | BM | 010182 | F-0049647 | FW UUMV | NFOG | | |

*** END OF RECORDS RETRIEVED ***

LINE NO 01

IJ166 DA CASE ID F-0121550 JUDCL CASE ID F-0121550
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 JUDICIAL INFORMATION

A010-020-030-040 FILE DATE 031201
 DEF NAME JOE DEMARCUS KENARD RACE B SEX M DOB 01011982 AGE 19
 DEF ADR1 2758 EXETER DR AC PH SS
 DEF CITY DALLAS ST TX ZIP DLNUM 02433591 DLST TX
 OFF CAP_MUR_FEL DT 030201 TYP/CL F X CDC/CAT CODE MR000000
 CDMT SID NUM OF AMT
 COMPLAINANT TAPE # ARREST DATE 030401
 JUV STAT REPEAT OFFENDER CAREER OFFENDER ORIG-LOC DSO CURR-LOC J
 FILING AGENCY TX0570800 SER/CAS NO 001220 ARREST NUM 010351
 LAI NUM 0865006 DSG NUMBER 0865006 BOOKIN NUM 01018390
 JP FILE DATE 000000 JP CASE ID JP COURT ID FED EVH AFF
 MAGISTRATE DATE 030601 MAGIS COURT OR MAGIS JUDGE LUSK BOUND OVER
 EXAM TRIAL DATE 000000 EXAM COURT EXAM JUDGE IND METH IND
 GJ/R/R DT 040601 N GJ# 0167_A1 GJ/R/FILE 040901 GJ DISP Y DA DISP DA ACCT Y
 JUDCL DISP DATE 000000 MISDEMEANOR REDUCTION SENTENCE PROBATED
 JUDCL CASE ID F-0121550 GJ CT FT PROS STAT C 310 PROS NAME FOX L
 COURT ASSIGNED TO FW DATE ASSIGNED 032101 ASSIGNED BY M REASON C
 PRECEDING DA CASE ID SUCCEEDING DA CASE ID
 TRN 907576944X TRS WARRANT STATUS S STATE OFF CD 09990008

NEXT

IJ166 DA CASE ID F-0121550 JUDCL CASE ID F-0121550
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

BONDS

B050
 DATE BOND SET 030601 AMT 500000.00 TYPE SET BY COURT OR JUDGE LUSK
 REC NO 01

B050
 DATE BOND SET 032201 AMT 750000.00 TYPE SET BY COURT JUDGE
 REC NO 01

SETS AND PASSES

00198

SET FOR DATE 032201 SET FOR TIME 0900 SET TYPE EXAM PASSED TO DATE _____
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS TO BE HEARD IN CCC#6
 STATES RECOMMENDATION _____ REC NO 01
 B060
 SET FOR DATE 061501 SET FOR TIME 0830 SET TYPE OTH PASSED TO DATE _____
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS PICK JURY PANEL _____
 STATES RECOMMENDATION _____ REC NO 01

NAMES

B070
 ASSOCIATED NAME LOLLAR BRAD NAME REF CODE CD0103070
 CT APPOINTED Y BAR NO _____ BOND MAKER _____ DT BOND MADE _____

NEXT

LJI66 DA CASE ID F-0121550 JUDCL CASE ID F-0121550
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

NAMES

B070
 ASSOCIATED NAME ALLEN SCOTTIE (2ND CHAIR) NAME REF CODE CD0104090
 CT APPOINTED Y BAR NO _____ BOND MAKER _____ DT BOND MADE _____

B070
 ASSOCIATED NAME LOLLAR BRAD NAME REF CODE CD0104110
 CT APPOINTED Y BAR NO _____ BOND MAKER _____ DT BOND MADE _____

B070
 ASSOCIATED NAME FOX LISA NAME REF CODE LP0103260
 CT APPOINTED Y BAR NO _____ BOND MAKER _____ DT BOND MADE _____

B070
 ASSOCIATED NAME FOX L NAME REF CODE LP0105090
 CT APPOINTED Y BAR NO _____ BOND MAKER _____ DT BOND MADE _____

GENERAL COMMENTS

WS DATE

B080 3-23-01 BOND SET AT \$750,000 X 032301 01
 CHARGE

C010

DEF NAME JOE DEMARCUS RENARD OFFENSE CD MR000000 STATE CD 09990008
 DESC CAP_MUR_FEL COMT TYP/CL F X GOC
 GJ COURT FT CURRENT COURT FW PREVIOUS COURTS CHOV DT

NEXT

LJI66 DA CASE ID F-0121550 JUDCL CASE ID F-0121550
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

DISPOSITION

C020-01-02 CT DISP NO 01
 VERDICT DATE 062201 BY JG DISP PGBC TC DISM TYP VOL 260 PAGE 46
 SENTENCE DATE 062201 BY JG TO L YEARS MTHS DAYS HOURS
 SENTENCE TO BEGIN 062201 SENTENCE VOL PAGE DISCHARGE N TYPE NUM
 PROBATED SENTENCE TO YEARS MONTHS DAYS MULT SENT C
 PROBATED FOR YEARS MONTHS DAYS PROBATION START DATE
 SPEC COND 1 FOR 2 FOR
 FINE CODE AMT 0.00 COST CODE N AMT 222.25 PAYMENT DUE
 REDUCED/ENHANCED CHARGE

DESC COUNTY CODE STATE CODE TYP/CL GOC

PROBATION REVOCATION FILE DATE WARRANT ISSUED DATE

DISPOSITION COMMENT

GENERAL COMMENTS

C080 041001 REPORTERS RECORD FILED VOLUME 1 OF 1
 DATE 041001

NEXT

LJI66 DA CASE ID F-0121550 JUDCL CASE ID F-0121550
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

GENERAL COMMENTS

C080 6-22-01 MATTER OF JURY 260/45

00199

R - 7

NEXT

IJI66 DA CASE ID F-0121548 JUDCL CASE ID F-0121548
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 JUDICIAL INFORMATION

A010-020-030-040 FILE DATE 031201
 DEF NAME JOE DEMARCUS KENARD RACE B SEX M DOB 01011982 AGE 19
 DEF ADRI 2758 EXETER DR AC PH SS
 DEF CITY DALLAS ST TX ZIP DLNUM 02433591 DLSI TX
 OFF CAP_MUR_MULT DT 030201 TYP/CL F X GDC/CAT CODE MR000000
 COMIT SID NUM OF AMT
 COMPLAINANT TAFE # ARREST DATE 030401
 JUV STAT REPEAT OFFENDER CAREER OFFENDER ORIG-LOC DSO CURR-LOC J
 FILING AGENCY TX0570800 SER/CAS NO 001220 ARREST NUM 010351
 LAI NUM 0865006 DSO NUMBER 0865006 BOOKIN NUM 01018390
 JP FILE DATE 000000 JP CASE ID JP COURT ID FED EVH AFF
 MAGISTRATE DATE 030601 MAGIS COURT OH MAGIS JUDGE LUSK BOUND OVER
 EXAM TRIAL DATE 000000 EXAM COURT EXAM JUDGE IND METH IND
 GJ/H/R DT 040601 H GJ 0170 A1 GJ/H/FILE 040901 GJ DISP T DA DISP DA ACCT Y
 JUDCL DISP DATE 000000 MISDEMEANOR REDUCTION SENTENCE PROBATED
 JUDCL CASE ID F-0121548 GJ CT FT PROS STAT PROS NAME
 COURT ASSIGNED TO FW DATE ASSIGNED 032101 ASSIGNED BY M REASON C
 PRECEDING DA CASE ID SUCCEEDING DA CASE ID
 TRN 907576944X TRS WARRANT STATUS S STATE OFF CD 09990015

NEXT

IJI66 DA CASE ID F-0121548 JUDCL CASE ID F-0121548
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

BONDS

B050
 DATE BOND SET 030601 AMT 500000.00 TYPE SET BY COURT OH JUDGE LUSK
 REC NO 01
 B050
 DATE BOND SET 032201 AMT 750000.00 TYPE SET BY COURT JUDGE
 REC NO 01

SETS AND PASSES

B060
 SET FOR DATE 032201 SET FOR TIME 0900 SET TYPE EXAM PASSED TO DATE 000000
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS TO BE HEARD IN CCC#6
 STATES RECOMMENDATION REC NO 01
 B060
 SET FOR DATE 061501 SET FOR TIME 0830 SET TYPE OTHE PASSED TO DATE
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS TO PICK JURY PANEL
 STATES RECOMMENDATION REC NO 01

NAMES

B070
 ASSOCIATED NAME LOLLAR BRAD NAME REF CODE CD0103070
 DT ASSOCIATED V DAD NO DIRM NAMED DT DIRM NAMED

00200

NEXT

LJI66 DA CASE ID F-0121548 JUDCL CASE ID F-0121548
A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

NAMES

B070
ASSOCIATED NAME ALLEN, SCOTTIE (2ND CHAIR) NAME REF CODE CD0104090
CT APPOINTED Y BAR NO BOND MAKER DT BOND MADE
B070
ASSOCIATED NAME LOLLAR, BRAD NAME REF CODE CD0104110
CT APPOINTED Y BAR NO BOND MAKER DT BOND MADE
B070
ASSOCIATED NAME FOX, LISA NAME REF CODE LP0103260
CT APPOINTED Y BAR NO BOND MAKER DT BOND MADE
GENERAL COMMENTS WS DATE
B090 3-22-01 BOND SET AT \$750,000 X 032301 01
CHARGE
C010
DEF NAME JOE, DEMARCUS, KENARD OFFENSE CD MR0000000 STATE CD 099900015
DESC CAP_MUR_MULT COMT TYP/CL F X GOC
CJ COURT FT CURRENT COURT FW PREVIOUS COURTS CHOV DT

NEXT

LJI66 DA CASE ID F-0121548 JUDCL CASE ID F-0121548
A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

DISPOSITION

C020-01-02 CT DISP NO 01
VERDICT DATE 062201 BY JG DISP PGBC TC DISM TYP VOL 260 PAGE 44
SENTENCE DATE 062201 BY JG TO L YEARS MTHS DAYS HOURS
SENTENCE TO BEGIN 062201 SENTENCE VOL PAGE DISCHARGE N TYPR NUM
PROBATED SENTENCE TO YEARS MONTHS DAYS MULT SENT C
PROBATED FOR YEARS MONTHS DAYS PROBATION START DATE
SPEC COND 1 FOR 2 FOR
FINE CODE AMT 0.00 COST CODE N AMT 222.25 PAYMENT DUE 000000
REDUCED/ENHANCED CHARGE
DESC MURDER COMT TYP/CL F I GOC
COUNTY CODE MR000000 STATE CODE 09990001
PROBATION REVOCATION FILE DATE 000000 WARRANT ISSUED DATE 000000

DISPOSITION COMMENT
GENERAL COMMENTS
C080 041001 REPORTERS RECORD FILED VOLUME 1 OF 1
DATE 041001

NEXT

LJI66 DA CASE ID F-0121548 JUDCL CASE ID F-0121548
A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

GENERAL COMMENTS

C080 6-22-01 WAIVER OF JURY 260/43
DATE 062201

00201

R 04

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 JUDICIAL INFORMATION

A010-020-030-040 FILE DATE 053100
 DEF NAME JOE DEMARCUS KENARD RACE B SEX M DOB 01011982 AGE 19
 DEF ADRI 2758 EXTER AC PH SS 466 55 7362
 DEF CITY DALLAS ST TX ZIP DLNUM 02433591 DLST TX
 OFF UUMV DT 053000 TYP/CL F S GDC/CAT CODE AU000000
 COMT SID NUM 05903313 OF AMT
 COMPLAINANT TAPE # ARREST DATE 053000
 JUV STAT REPEAT OFFENDER CAREER OFFENDER ORIG-LOC DSQ CURR-LOC J
 FILING AGENCY TXDPD0000 SER/CAS NO 406340J ARREST NUM 033136
 LAI NUM 0865006 DSO NUMBER 0865006 BOOKIN NUM 01001761
 JP FILE DATE 000000 JP CASE ID JP COURT ID FED EVH AFF
 MAGISTRATE DATE 053000 MAGIS COURT 92 MAGIS JUDGE CAMPOS BOUND OVER
 EXAM TRIAL DATE 000000 EXAM COURT EXAM JUDGE IND METH IND
 GJ/R/R DT 061300 H GJ# 4431 F1 GJ/W/FILE 061500 GJ DISP T DA DISP DA ACCT Y
 JUDCL DISP DATE 000000 MISDEMEANOR REDUCTION SENTENCE PROBATED
 JUDCL CASE ID F-0049647 GJ CT FU PROS STAT C 531 PROS NAME BENAVIDES D
 COURT ASSIGNED TO PW DATE ASSIGNED 032101 ASSIGNED BY M REASON C
 PRECEDING DA CASE ID SUCCEEDING DA CASE ID
 TRN 0041264762 TRS A001 WARRANT STATUS R STATE OFF CD 24110003

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

BONDS

B050
 DATE BOND SET 053000 AMT 1500.00 TYPE SET BY COURT 92 JUDGE CAMPOS
 REC NO 01

SETS AND PASSES

B060
 SET FOR DATE 062900 SET FOR TIME 0900 SET TYPE FIRS PASSED TO DATE
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS
 STATES RECOMMENDATION REC NO 01

B060
 SET FOR DATE 071800 SET FOR TIME 0900 SET TYPE PLEA PASSED TO DATE
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS OPEN
 STATES RECOMMENDATION REC NO 01

B060
 SET FOR DATE 011001 SET FOR TIME 0900 SET TYPE VIOL PASSED TO DATE
 SET DISPOSITION CODE PASSED GENERALLY COMMENTS PV
 STATES RECOMMENDATION REC NO 01

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

NAMES

B070
 ASSOCIATED NAME ABDAL-KHALLAQ HAMID NAME REF CODE CD00006020
 CT APPOINTED Y BAR NO BOND MAKER DT BOND MADE
 B070
 ASSOCIATED NAME LOLLAR BRAD NAME REF CODE CD0103290
 CT APPOINTED Y BAR NO BOND MAKER DT BOND MADE
 B070

00202

B_D5

CT APPOINTED BAR NO BOND MAKER DT BOND MADE
 B070
 ASSOCIATED NAME BENAVIDES D NAME REF CODE LP0006150
 CT APPOINTED BAR NO BOND MAKER DT BOND MADE
 GENERAL COMMENTS WS DATE
 B080 10/18/00 P/V MOTION (TO PROCEED) FILED AND WARRANT A 101800 01
 B080 1/10/01 AMENDED P/V MOTION FILED X 011001 01
 B080 1/10/01 P/V MOTION WITHDRAWN CONT. ON PROBATION R 011001 02
 B080 040601 P/V MTPH/ADJ WARRANT NO BOND A 040601 01

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 GENERAL COMMENTS WS DATE
 B080 6-22-01 P/V WITHDRAWN-WARRANT RECALLED R 062201 01
 CHARGE
 C010
 DEF NAME JOE DEMARCUS KENARD OFFENSE CD AU000000 STATE CD 24110003
 DESC UUMV COMT TYP/CL F S GOC
 GJ COURT FU CURRENT COURT FW PREVIOUS COURTS PP CHDV DT

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 DISPOSITION
 C020-01-02 CT DISP NO 01
 VERDICT DATE 071800 BY MC DISP MAGC TC DISM TYP VOL 380 PAGE 67
 SENTENCE DATE 071800 BY MC TO YEARS MTHS DAYS HOURS
 SENTENCE TO BEGIN 000000 SENTENCE VOL PAGE DISCHARGE N TYPE NUM
 PROBATED SENTENCE TO 5 YEARS MONTHS DAYS MULT SENT
 PROBATED FOR YEARS 3 MONTHS DAYS PROBATION START DATE 071800
 SPEC COND 1 FOR 2 FOR
 FINE CODE N AMT 300.00 COST CODE N AMT 350.00 PAYMENT DUE 000000
 REDUCED/ENHANCED CHARGE
 DESC COMT TYP/CL F S GOC
 COUNTY CODE STATE CODE
 PROBATION REVOCATION FILE DATE 040601 WARRANT ISSUED DATE 040601
 DISPOSITION COMMENT

NEXT

CJ166 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM
 DISPOSITION
 C020-01-02 CT DISP NO 02

00203

R. I.

SENTENCE DATE _____ BY _____ TO _____ YEARS _____ MTHS _____ DAYS _____ HOURS _____
 SENTENCE TO BEGIN _____ SENTENCE VOL _____ PAGE _____ DISCHARGE N TYPE _____ NUM _____
 PROBATED SENTENCE TO _____ YEARS _____ MTHS _____ DAYS _____ MULT SENT _____
 PROBATED FOR YEARS _____ MONTHS _____ DAYS _____ PROBATION START DATE _____
 SPEC COND 1 _____ FOR _____ 2 _____ FOR _____
 FINE CODE _____ AMT _____ 0.00 COST CODE _____ AMT _____ 0.00 PAYMENT DUE _____
 REDUCED/ENHANCED CHARGE _____
 DESC _____ COMT _____ TYP/CL _____ GOC _____
 COUNTY CODE _____ STATE CODE _____
 PROBATION REVOCATION FILE DATE _____ WARRANT ISSUED DATE _____
 DISPOSITION COMMENT _____

NEXT

LJI66 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

DISPOSITION

C020-01-02 CT DISP NO 03
 VERDICT DATE 062201 BY JC DISP DISM TC _____ DISM TYP NFOG VOL 260 PAGE 30 _____
 SENTENCE DATE _____ BY _____ TO _____ YEARS _____ MTHS _____ DAYS _____ HOURS _____
 SENTENCE TO BEGIN _____ SENTENCE VOL _____ PAGE _____ DISCHARGE N TYPE _____ NUM _____
 PROBATED SENTENCE TO _____ YEARS _____ MONTHS _____ DAYS _____ MULT SENT _____
 PROBATED FOR YEARS _____ MONTHS _____ DAYS _____ PROBATION START DATE _____
 SPEC COND 1 _____ FOR _____ 2 _____ FOR _____
 FINE CODE _____ AMT _____ 0.00 COST CODE _____ AMT _____ 0.00 PAYMENT DUE _____
 REDUCED/ENHANCED CHARGE _____
 DESC _____ COMT _____ TYP/CL _____ GOC _____
 COUNTY CODE _____ STATE CODE _____
 PROBATION REVOCATION FILE DATE _____ WARRANT ISSUED DATE _____
 DISPOSITION COMMENT _____

GENERAL COMMENTS

C080 071800 WAIVER OF JURY 330/68 C/C OF \$197.25 SERVED IN JAIL
 DATE 071800

NEXT

LJI66 DA CASE ID F-0049647 JUDCL CASE ID F-0049647
 A010 DEF NAME JOE DEM C010 DEF NAME JOE DEM

GENERAL COMMENTS

C080 081500 E/O MUD COP 384/67
 DATE 090100
 C080 1/10/01 E/O MUD COND 392/126-SERVE 45 DAYS IN DA CO JAIL BEG 1/10/01 WOR
 K RELEASE GRAN DATE 011001
 C080 3-21-01 E/O RECEIVING FROM 203RD 252/22
 DATE 032101

00204

Page 1

IN THE 194TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS.

CAUSE NO. F00-02424-M

JEDIDIAH ISAAC MURPHY

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, Jedidiah Isaac Murphy, has been found guilty by you of the offense of capital murder. You are instructed that a sentence of life confinement or death is mandatory on conviction for capital murder. In order for the Court to assess the proper punishment, two questions or special issues are submitted to you. Before answering these questions or special issues, you will consider the following instructions:

The burden of proof in this phase of the trial is on the State as to Special Issue 1; and the State has the burden of proof to prove beyond a reasonable doubt that the answer to Special Issue 1 submitted to the jury should be "Yes". The jury may not answer the Special Issue 1 "Yes" unless the jury agrees unanimously on such answer. Further, you may not answer this Special Issue 1 "No" unless (10) or more jurors agree. It is not necessary that members of the jury agree on what particular evidence supports a negative answer - that is, an answer of "No" - to Special Issue 1.

00205

Page 2

Special Issue 1 has been submitted to you requiring the State to prove the issue beyond a reasonable doubt, and on the issue of reasonable doubt you are instructed as follows:

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that makes a reasonable person hesitate to act in the most important of his affairs.

Proof beyond a reasonable doubt must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event that you have a reasonable doubt as to the issue under consideration by you, you will find against the State on that issue and not consider the testimony relating to that issue for any purpose.

The jury may not answer Special Issue 2 "No" unless the jury agrees unanimously on such answer. The jury may not answer Special Issue 2 "Yes" unless ten or more jurors agree. It is not necessary that members of the jury agree on what particular evidence supports an affirmative answer - that is, an answer of "Yes" - to Special Issue 2. In arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

00206

Page 3

In answering the Special Issues hereinafter submitted, you may consider all of the evidence admitted during the first phase of the trial, before your verdict of guilty, as well as all of the evidence admitted during the second phase of the trial.

In arriving at the answers to the issues submitted, it will not be proper for you to fix the same by lot or chance or any other method than a full, fair, and free exchange of the opinion of each individual juror.

You are further instructed that if there is testimony before you in this case regarding the defendant having committed other acts or participated in other transactions other than the offense alleged against him in the indictment in this case, that you cannot consider such other acts or transactions, if any, unless you first find beyond a reasonable doubt, as that term has heretofore been defined, that the defendant committed such acts or participated in such transactions, if any, but if you do not so believe, or if you have a reasonable doubt thereof, you will not consider such testimony for any purpose.

In deciding whether the defendant committed any alleged unadjudicated extraneous offenses or bad acts, the jury must not consider the fact that the defendant committed the capital murder alleged in the indictment. That is, you should not presume that the defendant has a propensity to commit

00207

Page 4

criminal acts generally, merely because you have convicted him of capital murder. The state must prove to you that the defendant committed any unadjudicated extraneous offense beyond a reasonable doubt.

Furthermore, if you find that the defendant committed one or more unadjudicated extraneous offenses, you must not consider that fact in deciding whether he committed other unadjudicated extraneous offenses alleged by the state.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant; and, in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the defendant has elected not to testify; and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against him.

Under the law applicable in this case, if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to

Page 5

this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in considering all the evidence before you and in answering the special issues.

After reading this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answers to the issues submitted to you. It is the duty of your presiding juror to preside in the jury room and vote with you on the answers to the issues submitted.

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are

00209

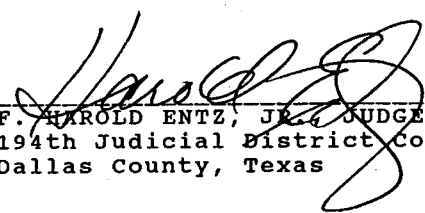
Page 6

not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

Page 7

After you have retired, you may communicate with this Court in writing through the bailiff who has you in charge. Your written communication must be signed by the presiding juror. Do not attempt to talk to the bailiff, the attorneys, or the Court regarding any question you may have concerning the trial of the case. After you have reached a verdict or if you desire to communicate with the Court, please use the jury call button on the wall and one of the bailiffs will respond.


F. HAROLD ENTZ, JR., JUDGE
194th Judicial District Court
Dallas County, Texas

FILED

2001 JUN 30 AM 9:51

JIM HAMLIN

DISTRICT CLERK

DALLAS CO. TEXAS

CLERK

00211

Page 8

The Special Issues, with the forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE NO. 1

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."


Presiding Juror

We, the Jury because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this special issue is "No."

Presiding Juror

Page 9

You are to answer the following issue only if you have returned an affirmative finding on Special Issue No. 1 above.

Concerning Special Issue 2, you are instructed that neither the Defendant nor the State bears the burden to prove or disprove the existence of mitigating circumstances. Neither does our law assign a standard of proof on the existence of mitigating circumstances.

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

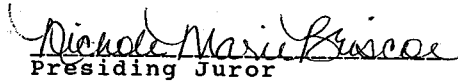
You are instructed that in answering this issue, you shall answer this issue "Yes" or "No." You may not answer the issue "No" unless the jury unanimously agree, and you may not answer the issue "Yes" unless ten or more jurors agree. The jury need not agree on what particular evidence supports an affirmative finding on this issue. The jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

00213

Page 10

ANSWER TO SPECIAL ISSUE NO. 2

We, the Jury, unanimously find that the answer to this Special Issue is "No."


Presiding Juror

We, the Jury, because at least ten (10) jurors agree as to the matter inquired about in this Special Issue, find that the answer to this Special Issue is "Yes."

Presiding Juror

VERDICT OF THE JURY

We, the Jury, having answered the foregoing issues, return the same into Court as our verdict.


Presiding Juror

00214

FORM 3
(REV. 09/01/94) THIS CASE IS ON APPEAL

TDC

F-0002424-NM

THE STATE OF TEXAS
VS.
JEDIDIAH ISAAC MURPHY

IN THE 194TH JUDICIAL DISTRICT
COURT OF
DALLAS COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

JULY TERM, A.D., 2001

JUDGE PRESIDING: HAROLD ENTZ

DATE OF JUDGMENT: 06/30/01

ATTORNEY
FOR STATE: GREG DAVIS/MARY MILLER

ATTORNEY
FOR DEFENDANT: JANE LITTLE, MICHAEL BYCK &
JENNIFER BALIDO

OFFENSE
CONVICTED OF: CAPITAL MURDER

DEGREE: A CAPITAL FELONY

DATE OFFENSE COMMITTED: 10/04/00

CHARGING
INSTRUMENT: INDICTMENT

PLEA: NOT GUILTY

JURY VERDICT: GUILTY

FOREMAN: NICHOLE MARIE BRISCOE

PLEA TO ENHANCEMENT
PARAGRAPH(S): N/A

FINDINGS ON
ENHANCEMENT: N/A

FINDINGS ON
DEADLY WEAPON, BIAS OR PREJUDICE,
AND/OR FAMILY VIOLENCE: THE JURY FINDS THAT DEFENDANT HEREIN USED OR EXHIBITED
A DEADLY WEAPON DURING THE COMMISSION OF SAID
OFFENSE TO-WIT: FIREARM.

PUNISHMENT
ASSESSED BY: JURY - SEE SPECIAL ISSUES ATTACHED HERETO AND
INCORPORATED BY REFERENCE.

DATE SENTENCE
IMPOSED: 06/30/01

COSTS: YES

PUNISHMENT AND DEATH
PLACE OF

CONFINEMENT: CONFINEMENT IN THE INSTITUTIONAL DIVISION DATE TO
OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE COMMENCE: 06/30/01
AND A FINE OF - 0 -

TIME CREDITED: 101600-063001

RESTITUTION/REPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

PA

VOL. 475 PAGE 106

00215

NO F-0002424-NM

ON THIS DAY, SET FORTH ABOVE, THE ABOVE STYLED AND NUMBERED CAUSE CAME TO TRIAL. THE STATE OF TEXAS AND DEFENDANT APPEARED BY [REDACTED] THROUGH THE ABOVE-NAMED ATTORNEYS AND ANNOUNCED READY FOR TRIAL. DEFENDANT APPEARED IN PERSON IN OPEN COURT. WHERE DEFENDANT WAS NOT REPRESENTED BY COUNSEL, DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE RIGHT TO REPRESENTATION BY COUNSEL, WHERE SHOWN ABOVE THAT THE CHARGING INSTRUMENT WAS BY INFORMATION INSTEAD OF INDICTMENT, THE DEFENDANT DID, WITH THE CONSENT AND APPROVAL OF HIS ATTORNEY WAIVE HIS RIGHT TO PROSECUTION BY INDICTMENT AND AGREE TO BE TRIED ON AN INFORMATION. ALL SUCH WAIVERS, AGREEMENTS AND CONSENTS WERE IN WRITING AND FILED IN THE PAPERS OF THIS CAUSE PRIOR TO THE DEFENDANT ENTERING HIS PLEA HEREIN. DEFENDANT IN OPEN COURT WAS DULY ARRAIGNED, AND ENTERED THE ABOVE SHOWN PLEA. WHERE SHOWN ABOVE THAT DEFENDANT ENTERED A PLEA OF GUILTY, DEFENDANT WAS ADMONISHED BY THE COURT OF THE CONSEQUENCES OF THE SAID PLEA AND DEFENDANT PERSISTED IN ENTERING SAID PLEA, AND IT PLAINLY APPEARING TO THE COURT THAT DEFENDANT IS MENTALLY COMPETENT AND SAID PLEA IS FREE AND VOLUNTARY. THE SAID PLEA WAS ACCEPTED BY THE COURT AND IS NOW ENTERED OF RECORD AS THE PLEA HEREIN OF DEFENDANT. THEREUPON A JURY WAS DULY SELECTED, IMPANELED AND SWORN, WHO, HAVING HEARD THE CHARGING INSTRUMENT, AS SHOWN ABOVE PRESENTED, AND DEFENDANT'S PLEA THERETO, AND HAVING HEARD THE EVIDENCE SUBMITTED, AND HAVING BEEN DULY CHARGED BY THE COURT AS TO THEIR DUTY TO DETERMINE THE GUILT OR INNOCENCE OF THE DEFENDANT AND AFTER HAVING HEARD THE ARGUMENTS OF COUNSEL, RETIRED IN CHARGE OF THE PROPER OFFICER TO CONSIDER OF THEIR VERDICT AND AFTERWARD WERE BROUGHT INTO OPEN COURT, BY THE PROPER OFFICER, DEFENDANT AND HIS COUNSEL BEING PRESENT, AND IN DUE FORM OF LAW RETURNED INTO OPEN COURT THE ABOVE SHOWN VERDICT, WHICH WAS RECEIVED AND ACCEPTED BY THE COURT, AND IS HERE AND NOW ENTERED UPON THE MINUTES OF THE COURT.

AND WHEN SHOWN ABOVE THAT THE CHARGING INSTRUMENT CONTAINS ENHANCEMENT PARAGRAPHS(S), WHICH WERE NOT WAIVED OR DISMISSED, THE COURT, AFTER HEARING THE DEFENDANT'S PLEA TO SAID PARAGRAPH(S) AS SET OUT ABOVE AND, AFTER HEARING FURTHER EVIDENCE ON THE ISSUE OF PUNISHMENT, THE COURT, OR JURY, MAKES ITS FINDING AS SET OUT ABOVE; IF TRUE, THE COURT, OR JURY, IS OF THE OPINION AND FINDS DEFENDANT HAS BEEN HERETOFORE CONVICTED OF SAID OFFENSE(S) ALLEGED IN THE SAID ENHANCEMENT PARAGRAPH(S) AS MAY BE SHOWN ABOVE.

WHEN IT IS SHOWN ABOVE THE DEFENDANT IS GUILTY OF THE OFFENSE SET FORTH ABOVE, IT IS CONSIDERED BY THE COURT THAT SAID DEFENDANT IS ADJUDGED TO BE GUILTY OF THE OFFENSE SET FORTH ABOVE, AND THAT DEFENDANT COMMITTED THE OFFENSE ON THE DATE SET FORTH ABOVE AS CHARGED IN THE INSTRUMENT SHOWN ABOVE, AND THAT DEFENDANT WAS PREVIOUSLY CONVICTED WHEN SHOWN ABOVE IN THE MANNER ABOVE, AND THAT SAID DEFENDANT BE PUNISHED AS HAS BEEN DETERMINED, SAID PUNISHMENT BEING ASSESSED BY THE ABOVE SHOWN ASSESSOR OF PUNISHMENT, AS ELECTED IN WRITING BY DEFENDANT, AND BE CONFINED IN THE PLACE OF CONFINEMENT SHOWN ABOVE FOR THE TERM OF TIME SET FORTH ABOVE, AND THAT THE STATE OF TEXAS DO HAVE AND RECOVER OF THE SAID DEFENDANT ALL COSTS IN THIS PROSECUTION EXPENDED INCLUDING ANY FINE SHOWN FOR WHICH LET EXECUTION ISSUE. THE COURT FURTHER MAKES ITS FINDING AS TO DEADLY WEAPON AS SET FORTH ABOVE BASED UPON THE JURY'S VERDICT OR THE FINDINGS OF THE COURT WHEN PUNISHMENT FIXED BY THE COURT. THE COURT MAKES ITS FINDINGS AS TO FAMILY VIOLENCE AND BIAS OR PREJUDICE AS SET FORTH ABOVE.

WHEN IT IS SHOWN ABOVE THAT RESTITUTION HAS BEEN ORDERED, BUT THE COURT DETERMINES THAT THE INCLUSION OF THE VICTIM'S NAME AND ADDRESS IN THE JUDGMENT IS NOT IN THE BEST INTEREST OF THE VICTIM, THE PERSON OR AGENCY WHOSE NAME AND ADDRESS IS SET OUT IN THIS JUDGMENT WILL ACCEPT AND FORWARD THE RESTITUTION PAYMENTS TO THE VICTIM.

AND WHEN IT IS SHOWN BELOW THAT PAYMENT OF THE COSTS OF LEGAL SERVICES PROVIDED TO THE DEFENDANT IN THIS CAUSE HAS BEEN ORDERED, THE COURT FINDS THAT THE DEFENDANT HAS THE FINANCIAL RESOURCES TO ENABLE THE DEFENDANT TO OFFSET SAID COSTS IN THE AMOUNT ORDERED.

THEREUPON THE SAID DEFENDANT WAS ASKED BY THE COURT WHETHER HE HAD ANYTHING TO SAY WHY SAID SENTENCE SHOULD NOT BE PRONOUNCED AGAINST HIM, AND HE ANSWERED NOTHING IN BAR THEREOF, AND IT APPEARING TO THE COURT THAT THE DEFENDANT IS MENTALLY COMPETENT AND UNDERSTANDING OF THE PROCEEDINGS.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT, IN THE PRESENCE OF DEFENDANT, AND HIS ATTORNEY, THAT SAID JUDGMENT AS SET FORTH ABOVE, IS HEREBY IN ALL THINGS APPROVED AND CONFIRMED, AND THAT DEFENDANT, WHO HAS

NO F-0002424-NM

BEEN ADJUDGED GUILTY OF THE ABOVE NAMED OFFENSE, AS SHOWN ABOVE, AND WHOSE PUNISHMENT HAS BEEN ASSESSED BY THE COURT OR THE JURY AS SHOWN ABOVE, THAT SAID DEFENDANT BE PUNISHED IN ACCORDANCE WITH THE PUNISHMENT SET FORTH ABOVE, AND THAT DEFENDANT SHALL BE DELIVERED BY THE SHERIFF TO THE DIRECTOR OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, OR OTHER PERSON LEGALLY AUTHORIZED TO RECEIVE SUCH CONVICTS FOR THE PUNISHMENT ASSESSED HEREIN, AND SAID DEFENDANT SHALL BE CONFINED FOR THE ABOVE-NAMED TERM IN ACCORDANCE WITH THE PROVISIONS OF LAW GOVERNING SUCH PUNISHMENTS. IT IS FURTHER ORDERED THAT THE DEFENDANT PAY THE FINE, COURT COSTS, COSTS AND EXPENSES OF LEGAL SERVICES PROVIDED BY THE COURT APPOINTED ATTORNEY IN THIS CAUSE, IF ANY, AND RESTITUTION OR REPARATION, AS SET FORTH HEREIN, FOR WHICH LET EXECUTION ISSUE.

DEFENDANT IS HEREBY ORDERED REMANDED TO JAIL UNTIL SAID SHERIFF CAN OBEY THE DIRECTIONS OF THE JUDGMENT.

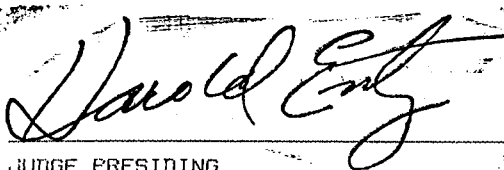
FOLLOWING THE DISPOSITION OF THIS CAUSE THE DEFENDANT'S FINGERPRINT WAS, IN OPEN COURT, PLACED UPON A CERTIFICATE OF FINGERPRINT. SAID CERTIFICATE IS ATTACHED HERETO AND IS INCORPORATED BY REFERENCE AS A PART OF THIS JUDGMENT.

WHEN REQUIRED, A PRESENTENCE INVESTIGATION WAS CONDUCTED IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF LAW.

DEFENDANT EXCEPTS AND GIVES NOTICE OF APPEAL TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS.

COURT COSTS IN THE AMOUNT OF \$242.25

*Immediately upon release, defendant must report in person to the Felony Collections Dept., 2nd fl., Rm. C2-3, Crowley Courts Bldg., Dallas, TX, for payment arrangement of court ordered costs, fines and/or attorney fees.


JUDGE PRESIDING

JUDGMENT
CERTIFICATE OF THUMBPRINT

CAUSE NO. F0002424M

THE STATE OF TEXAS

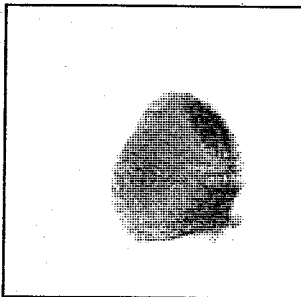
IN THE 194th

VS.

JUDICIAL DISTRICT COURT

DALLAS COUNTY, TEXAS

VED/ DIAH / SAAC MORPHY



Right
Thumb*



Defendant's RIGHT hand

THIS IS TO CERTIFY THAT THE FINGERPRINTS ABOVE ARE THE ABOVE-NAMED DEFENDANT'S FINGERPRINTS TAKEN AT THE TIME OF DISPOSITION OF THE ABOVE STYLED AND NUMBERED CAUSE.

DONE IN COURT THIS 30 DAY OF June, 2001.

[Signature]
BAILIFF/DEPUTY SHERIFF

*Indicate here if print other than defendant's right thumbprint is placed in box:

☐ left thumbprint

☐ left/right index finger

☐ other, _____

478/135

38

THE STATE OF TEXAS

CAUSE NO. F00-02424-17

VS.

194th

DISTRICT COURT

Jedidiah Murphy

DALLAS COUNTY, TEXAS

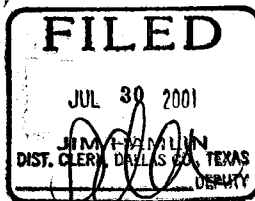
DEFENDANT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Defendant in the above cause and by his Attorney, and moves the Court to grant him a New Trial herein for the good and sufficient reason that the verdict is contrary to the law and the evidence.

Wherefore, Defendant prays the Court grant a new trial herein.

Respectfully submitted,



Adam Seidel

Attorney for Defendant

Adam Seidel

SB# 17999290

2515 McKinney Ave #1400

Dallas, TX 75201

ph 214-537-0835

ORDER

The above Motion is hereby (granted) (~~overruled~~).

AUG 06 2001

[Signature]
Judge

00219

JUDGMENT / SENTENCE D June 30, 2001
MOTION FOR NEW TRIAL FILED YES ☒ NO ☐ DATE N/A
Alexander
Deputy District Clerk

DRAWER #40

THE STATE OF TEXAS

CAUSE NO. F00-02424-M

VS.

Jedidiah Isaac Murphy

Judicial DISTRICT COURT 194

DALLAS COUNTY, TEXAS

DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH

APPOINTMENT OF ATTORNEY ON APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

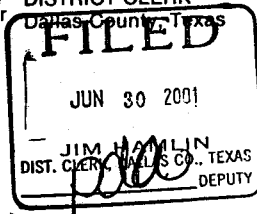
Comes now Defendant in the above cause and states: I am the defendant in the above cause; I was convicted in this cause and now give Notice of Appeal to the Texas Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, and that I am penniless, destitute and indigent person, too poor to employ counsel to represent me on the appeal, and too poor to pay for or give security for the Statement of Facts and a true copy thereof herein.

WHEREFORE, I pray that the Court will appoint an attorney to represent me in this appeal and that the Court will order the Court Reporter of this Court to prepare and deliver to me or my appointed Counsel the original and a true copy of the Statement of Facts in this case, together with all exhibits attached thereto if practical.

Jedidiah S. Murphy
Defendant

BEFORE ME, the undersigned authority, personally appeared the above Defendant, known to me to be the person whose signature appears above, and after being duly sworn on oath states that he is the defendant in the above cause, and that the matters and things set forth in the foregoing are true and correct in all things.

BILL LONG
DISTRICT CLERK
Dallas County, Texas



By

Alexander
Deputy District Clerk

ORDER

214-237-0835

The Defendant having requested the Court to appoint Counsel,

It is Ordered the Honorable

ADAM SEIDEL
Address: 2515 McKinney Suite 1400 Dallas, TX 75201
a regular licensed and practicing attorney of Texas, be, and he is hereby appointed to represent Defendant in prosecuting his appeal herein, and it is further Ordered that the Court Reporter is hereby directed to transcribe all of the notes as same may appertain to this cause and as taken during the trial of this cause which began on

February 26, 2001, and make Statement of Facts in duplicate and furnish same to Defendant or his appointed Counsel.

Harold E. [Signature]
Judge

00220

F-00-02424-M

| | | |
|-----------------------|---|-----------------------------------|
| THE STATE OF TEXAS | § | IN THE 194 TH JUDICIAL |
| v. | § | DISTRICT COURT |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |

ORDER APPOINTING COUNSEL
PURSUANT TO ARTICLE 11.071 C.C.P.

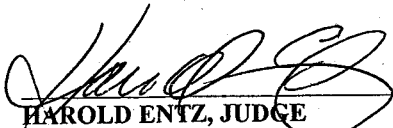
The Defendant having been convicted of capital murder and sentenced to death, it is the duty of this court pursuant to Article 11.071 of the Code of Criminal Procedure to appoint counsel for the purpose of preparing and filing a writ of habeas corpus on the defendant's behalf; and

The Court, having determined that the Defendant is indigent;

IT IS THEREFORE ORDERED that the Honorable JOHN STON, JR. ^{JAS. A}, telephone no. 214-939-232 is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 of the Code of Criminal Procedure.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately send a copy of the judgment in this case along with a copy of this order to the Court of Criminal Appeals in Austin, Texas.

SIGNED this 12 day of September, 2001.


HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

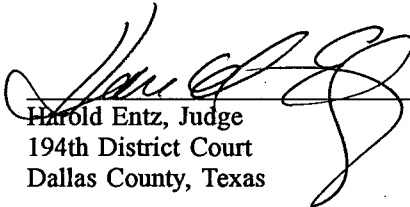
F00-02424-M

THE STATE OF TEXAS : IN THE 194TH JUDICIAL
V. : DISTRICT COURT
JEDIDIAH ISAAC MURPHY : DALLAS COUNTY, TEXAS

ORDER REMOVING COUNSEL

Subsequent to the Court appointing the Hon. James A. Johnston, Jr., Dallas, TX, telephone no. 214-939-9232 to represent Jedidiah Isaac Murphy pursuant to Article 11.071 C.C.P., counsel apprised the Court that he had withdrawn his name from the list of attorneys authorized to represent indigent defendants in capital habeas corpus writs, therefore James A. Johnston, Jr. is removed as Attorney of Record for Jedidiah Isaac Murphy and the Hon. Robert Abbot is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure.

Signed this the 4th day of October, A.D., 2001.


Harold Entz, Judge
194th District Court
Dallas County, Texas

F-00-02424-M

| | | |
|-----------------------|---|-----------------------------------|
| THE STATE OF TEXAS | § | IN THE 194 TH JUDICIAL |
| v. | § | DISTRICT COURT |
| JEDIDIAH ISAAC MURPHY | § | DALLAS COUNTY, TEXAS |

ORDER APPOINTING COUNSEL
PURSUANT TO ARTICLE 11.071 C.C.P.


The Defendant having been convicted of capital murder and sentenced to death, it is the duty of this court pursuant to Article 11.071 Of the Code of Criminal Procedure to appoint counsel for the purpose of preparing and filing a writ of habeas corpus on the defendant's behalf; and

The Court, having determined that the Defendant is indigent;

IT IS THEREFORE ORDERED that the Honorable Robt. Abbott, telephone no. _____, is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 Of the Code of Criminal Procedure.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately send a copy of the judgment in this case along with a copy of this order to the Court of Criminal Appeals in Austin, Texas.

SIGNED this 4 day of Oct, 2001.



HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

FILED

CAUSE NO. F00-02424-M

2001 JUL 11 AM 10:10

STATE OF TEXAS

v.

JEDIDIAH MURPHY

JUN 11 2010
JIM HANKLIN
DISTRICT CLERK
DALLAS COUNTY, TEXAS
DEPUTY

194th JUDICIAL DISTRICT

COURT OF

DALLAS COUNTY, TEXAS

Appeals

**DEFENDANT'S REQUEST FOR CLERK'S AND
COURT REPORTER'S RECORD AND EXHIBITS ON APPEAL**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant in the above styled cause, and files this Request For Clerk's And Court Reporter's Record pursuant to the Texas Rules of Appellate Procedure, and respectfully requests that the Clerk and Court Reporter of this Honorable Court make and prepare as a part of the record in the appeal of this cause, true copies of the following items to be included in the appellate record:

1. Indictment or criminal information.
2. All motions and pleadings filed by the Defendant, including,
 - a. Motion For Discovery.
 - b. Motion For Production and Inspection of Evidence and Information which may lead to Evidence (Brady v. Maryland).
 - c. Motion For List of State's Witnesses.
 - d. Motion For Court Reporter to Transcribe Proceedings.
 - e. Motion for Election as to Punishment.
 - f. Motion For Severance.
 - g. Motion For Continuance.
 - h. Motion To Suppress Evidence.
 - i. Motion To Suppress Statements.
 - j. Motion To Suppress Extraneous Offenses.
 - k. Motion In Limine.
 - l. Exceptions To The Indictment and Motion To Quash.
 - m. Motion Challenging In Court Identification.
 - n.. Application For Probation.
 - o. Motion To Disclose Identity of Informer.
 - p. All written trial objections.
 - q. Motion To Shuffle Jury Panel.
 - r. Motion For Hearing On Reputation/Character Witnesses.
 - s. Written Rule 609 request.
 - t. Motion For Change of Venue.
 - u. Motion For Instructed Verdict.

00224

3. State's pleadings, including the Motions In Limine and all rulings of the Court.
4. Court's docket sheet and all entries made by the Court.
5. List of the venire persons, including the lists of the Court, State, and Defendant.
6. The strike lists reflecting the strikes made by the state and defense, and the list of those persons who sat as jurors.
7. Transcription of voir dire examination of the panel, including all statements and arguments of the State, defense, the Court, and the venire persons.
8. Transcription of the hearing challenging the composition of the jury, including any Batson challenge, and the rulings of the Court thereon.
9. Transcription of the opening statements of counsel.
10. Transcription of the testimony of each witness, and of all evidence introduced, during all pretrial hearings and trial proceedings, including:
 - a. hearing on Defendant's Motion to Suppress.
 - b. hearings on admissibility of in court identifications.
 - c. hearings on admissibility of extraneous offenses.
 - d. hearings on admissibility of Defendant's statements.
 - e. hearings challenging the sufficiency of the indictment or information.
 - f. all hearings conducted on each defense motion.
11. Transcription of the testimony of all witnesses and all evidence introduced at trial in the guilt/innocence and punishment phases.
12. Transcription of the testimony of all hearings held outside the presence of the jury, including the rulings of the Court.
13. All verbal and written communication between the jury and the Court.
14. All communication between the Court and counsel for the State and defense.
15. All defense objections made by the defense to the Charge of the Court, submitted to the jury during trial on the issues of guilt and punishment and all rulings of the Court.
16. All defense requested instructions made by the defense to the charge on guilt/innocence and on punishment.
17. All jury arguments of counsel during guilt/innocence and punishment phases.
18. The verdicts of the jury at guilt and at punishment.

19. All notes from the jury to the Court, all responses thereto, and all objections by the defense to any such response of the Court.
20. A transcription of all proceedings in conjunction with any plea of guilty by the Defendant.
21. All defense pleadings in conjunction with any plea of guilty by Defendant, including the jury waiver, plea, judicial confession, plea agreement and the Court's admonition of rights.
22. A transcription of all hearings in connection with Defendant's probation revocation.
23. The judgment and sentence of the Court.
24. The Motion For New Trial and all Amended Motions For New Trial.
25. Transcription of all hearings on Defendant's Motion and Amended Motions for New Trial and the rulings of the Court thereon.
26. Defendant's Notice of Appeal.
27. The original of all exhibits introduced into evidence at trial.
28. The original of all exhibits introduced at any hearing before the Court.
29. Defendant's affidavit of Indigency and Motion for Free Transcript.
30. Defendant's Request for Clerk's and Court Reporter's Record and Exhibits on Appeal.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays the Clerk and the Court Reporter be ordered to make and prepare the foregoing materials and include them in the appellate record in this cause on appeal.

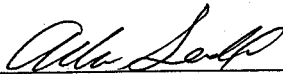
Respectfully submitted,



Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75201
Ph. 214-237-0835
Fax 214-237-0901
State Bar No. 17999290

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was hand delivered to the District Attorney's Office, Appellate Section, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, on this the 11th day of July, 2001.

A handwritten signature in cursive script, appearing to read "Adam L. Seidel", is written over a horizontal line.

Adam L. Seidel

CAUSE NO. F00-02424-M

STATE OF TEXAS

194th JUDICIAL DISTRICT

V.

COURT OF

JEDIDIAH MURPHY

DALLAS COUNTY, TEXAS

ORDER

The foregoing Defendant's Request for Clerk's and Court Reporter's Record and Exhibits on Appeal filed by the Defendant was properly and timely brought to the attention of the Court and the Court finds that the same has merit. It is hereby ORDERED that the Clerk and each Court Reporter involved in the proceedings herein make and prepare all matters set forth in the Defendant's Request for Clerk and Court Reporter's Record and Exhibits on Appeal, and file said matters with the Clerk of the Court of Appeals immediately upon completion, and that the Clerk and each Court Reporter furnish a copy of said documents to counsel for the Defendant.

Signed and entered this the 18 day of July, 2001.

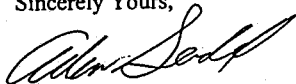

Judge Presiding

00228

17. All jury arguments of counsel during guilt/innocence and punishment phases.
18. The verdicts of the jury at guilt and at punishment.
19. All notes from the jury to the Court, all responses thereto, and all objections by the defense to any such response of the Court.
20. A transcription of all proceedings in conjunction with any plea of guilty by the Defendant.
21. All defense pleadings in conjunction with any plea of guilty by Defendant, including the jury waiver, plea, judicial confession, plea agreement and the Court's admonition of rights.
22. A transcription of all hearings in connection with Defendant's probation revocation.
23. The judgment and sentence of the Court.
24. The Motion For New Trial and all Amended Motions For New Trial.
25. Transcription of all hearings on Defendant's Motion and Amended Motions for New Trial and the rulings of the Court thereon.
26. Defendant's Notice of Appeal.
27. The original of all exhibits introduced into evidence at trial.
28. The original of all exhibits introduced at any hearing before the Court.
29. Defendant's affidavit of Indigency and Motion for Free Transcript.
30. Defendant's Request for Clerk's and Court Reporter's Record and Exhibits on Appeal.

Please feel free to contact me regarding any questions you may have. Thank you.

Sincerely Yours,



Adam L. Seidel

- s. Written Rule 609 request.
 - t. Motion For Change of Venue.
 - u. Motion For Instructed Verdict.
-
- 3. State's pleadings, including the Motions In Limine and all rulings of the Court.
 - 4. Court's docket sheet and all entries made by the Court.
 - 5. List of the venire persons, including the lists of the Court, State, and Defendant.
 - 6. The strike lists reflecting the strikes made by the state and defense, and the list of those persons who sat as jurors.
 - 7. Transcription of voir dire examination of the panel, including all statements and arguments of the State, defense, the Court, and the venire persons.
 - 8. Transcription of the hearing challenging the composition of the jury, including any Batson challenge, and the rulings of the Court thereon.
 - 9. Transcription of the opening statements of counsel.
 - 10. Transcription of the testimony of each witness, and of all evidence introduced, during all pretrial hearings and trial proceedings, including:
 - a. hearing on Defendant's Motion to Suppress.
 - b. hearings on admissibility of in court identifications.
 - c. hearings on admissibility of extraneous offenses.
 - d. hearings on admissibility of Defendant's statements.
 - e. hearings challenging the sufficiency of the indictment or information.
 - f. all hearings conducted on each defense motion.
 - 11. Transcription of the testimony of all witnesses and all evidence introduced at trial in the guilt/innocence and punishment phases.
 - 12. Transcription of the testimony of all hearings held outside the presence of the jury, including the rulings of the Court.
 - 13. All verbal and written communication between the jury and the Court.
 - 14. All communication between the Court and counsel for the State and defense.
 - 15. All defense objections made by the defense to the Charge of the Court, submitted to the jury during trial on the issues of guilt and punishment and all rulings of the Court
 - 16. All defense requested instructions made by the defense to the charge on guilt/innocence and on punishment.

FILED
ADAM L. SEIDEL, P.C.
ATTORNEY AND COUNSELOR AT LAW
CHATEAU PLAZA, SUITE 1400
2515 MCKINNEY AVENUE
DALLAS, TEXAS 75201
2001 JUL 11 AM 10:10

ADAM L. SEIDEL

CLERK
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

PH 214-237-0835
FAX 214-237-0901

July 11, 2001

Official Court Reporter
194th Judicial District Court
Frank Crowley Courts Bldg.
133 N. Industrial Blvd.
Dallas, Texas 75207

Re: State v. Jedidiah Murphy; Cause Number F00-02424-M

To the Official Court Reporter,

Pursuant to Texas Rule of Appellate Procedure 34.6, please accept this written request on behalf of the Defendant to prepare the reporter's record accurately transcribing all trial court proceedings in the above referenced cause, including all proceedings relating to the following:

1. Indictment or criminal information.
2. All motions and pleadings filed by the Defendant, including,
 - a. Motion For Discovery.
 - b. Motion For Production and Inspection of Evidence and Information which may lead to Evidence (Brady v. Maryland).
 - c. Motion For List of State's Witnesses.
 - d. Motion For Court Reporter to Transcribe Proceedings.
 - e. Motion for Election as to Punishment.
 - f. Motion For Severance.
 - g. Motion For Continuance.
 - h. Motion To Suppress Evidence.
 - i. Motion To Suppress Statements.
 - j. Motion To Suppress Extraneous Offenses.
 - k. Motion In Limine.
 - l. Exceptions To The Indictment and Motion To Quash.
 - m. Motion Challenging In Court Identification.
 - n.. Application For Probation.
 - o. Motion To Disclose Identity of Informer.
 - p. All written trial objections.
 - q. Motion To Shuffle Jury Panel.
 - r. Motion For Hearing On Reputation/Character Witnesses.

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00231

CAUSE NO. F00-02424M
FILED

THE STATE OF TEXAS 2001 MAY 31 AM 9:39)

vs.)

JEDIDIAH ISAAC MURPHY)
 JIM HAMLIN)
 DISTRICT CLERK)
 DALLAS CO. TEXAS)
 DEPUTY)

IN THE DISTRICT OF

DALLAS COUNTY, TEXAS

194TH JUDICIAL DISTRICT

PEREMPTORY JURY CHALLENGE

TO THE HONORABLE JUDGE OF SAID COURT:

Jury voir dire having been completed, comes now The Defendant in the above cause and would show the Court that he does here and now exercise his peremptory challenges herein on the following jurors:

| Challenge Number | Juror Number | Name of Juror |
|------------------|--------------|---------------|
| 1. | #350 | M. CANNON |
| 2. | 2033 | G. SMOTHERS |
| 3. | 1123 | P. MAY |
| 4. | 1958 | J. ROBUCK |
| 5. | 1778 | T. CLINTON |
| 6. | 837 | D. LAYNE |
| 7. | 119 | D. KAPPEL |
| 8. | 77 | T. BROOKS |
| 9. | 1678 | M. CHANDLER |
| 10. | 62 | C. BOALES |
| 11. | 161 | R. WRIGHT |
| 12. | 362 | R. ADAIR |
| 13. | 403 | K. EDGE |
| 14. | 971 | P. KELLNER |
| 15. | 1026 | J. WILSON |
| 16. | 278 | K. WILLIAMS |
| 17. | 1131 | A. LONDON |
| 18. | 1115 | M. COLDITZ |

Respectfully Submitted,

Jane Little

Attorney for the Defendant

Harold Entz, Judge
 194TH Judicial District Court

00232

FILED
 CAUSE NO. F00-02424M
 2001 MAY 31 AM 9:48

THE STATE OF TEXAS

vs.

JEDIDIAH ISAAC MURPHY

JIM AMLIN
 DISTRICT CLERK
 DALLAS CO., TEXAS
 DEPUTY

IN THE DISTRICT OF

DALLAS COUNTY, TEXAS

194TH JUDICIAL DISTRICT

PEREMPTORY JURY CHALLENGE

TO THE HONORABLE JUDGE OF SAID COURT:

Jury voir dire having been completed, comes now The State in the above cause and would show the Court that he does here and now exercise his peremptory challenges herein on the following jurors:

| Challenge Number | Juror Number | Name of Juror |
|------------------|--------------|----------------------|
| 1. | 5 | GREG GRIFFING |
| 2. | 6 | JUDY MORTON |
| 3. | 8 | ANDREA BIGGERSTAFF |
| 4. | 10 | MICHAEL UPCHURCH |
| 5. | 11 | PATRICK SKEETERS |
| 6. | 16 | PATRICIA THRONEBERRY |
| 7. | 20 | JACK WEBB |
| 8. | 21 | LYONDEAKER JR |
| 9. | 26 | ANNETTE MORTON |
| 10. | 33 | GLORIA SMITS |
| 11. | 39 | ORVIS REYNOLDS |
| 12. | 41 | JAMI MASSEY |
| 13. | 42 | BILL PITILLO |
| 14. | 43 | CLARK REYNOLDS |
| 15. | 45 | WILLIAM SHERP |

Respectfully Submitted,

 Attorney for the State

Harold Entz, Judge
 194TH Judicial District Court

00233

Certification

The State of Texas X

County of Dallas X

VOL. 1:01-234

I, Jim Hamlin, Clerk of the 194TH JUDICIAL DISTRICT COURT of Dallas County, Texas do hereby certify that the documents contained in this record to which this certification is attached are all of the documents specified by Texas Rule of Appellate Procedure 34.5 (a) and all other documents timely requested by a party to this proceeding under Texas Rule of Appellate Procedure 34.5 (b).

GIVEN UNDER MY HAND AND SEAL at my office in Dallas County, Texas this 25TH day of OCTOBER, 2001.

Signature of clerk Jane Miller

Name of clerk JANE MILLER

Title DEPUTY CLERK

MAXIMUM TIME ALLOWED

JUDGMENT _____

MNT _____

CLERK'S RECORD 60 DAYS _____ 120 DAYS _____ MT _____

REPORTERS RECORD 60 DAYS _____ 120 DAYS _____ MT _____

APPELLANT'S BRIEF 6-3-02

STATE'S BRIEF 1-23-02

November 7, 2001

Robert P. Abbott
120 S Denton Tap Road
Suite 450C-188
Coppell, TX 75019-3225

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

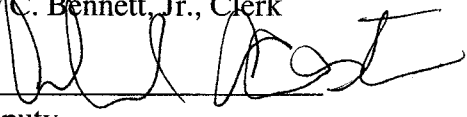
Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

The order appointing, Robert Abbott, counsel pursuant to Article 11.071, V.A.C.C.P. in the above styled and numbered cause has been received and approved by the Court.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

F-00-02424-M

THE STATE OF TEXAS

§

IN THE 194TH JUDICIAL

v.

§

DISTRICT COURT

JEDIDIAH ISAAC MURPHY

§

DALLAS COUNTY, TEXAS

ORDER APPOINTING COUNSEL
PURSUANT TO ARTICLE 11.071 C.C.P.

The Defendant having been convicted of capital murder and sentenced to death, it is the duty of this court pursuant to Article 11.071 Of the Code of Criminal Procedure to appoint counsel for the purpose of preparing and filing a writ of habeas corpus on the defendant's behalf; and

The Court, having determined that the Defendant is indigent;

IT IS THEREFORE ORDERED that the Honorable Robert Abbott, telephone no. _____, is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 Of the Code of Criminal Procedure.

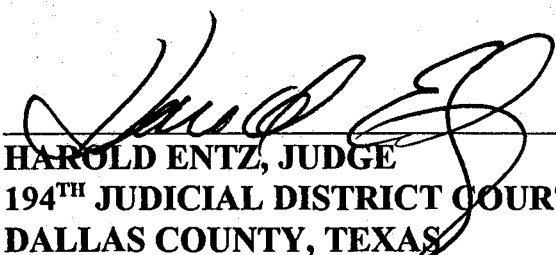
IT IS FURTHER ORDERED that the Clerk of this Court shall immediately send a copy of the judgment in this case along with a copy of this order to the Court of Criminal Appeals in Austin, Texas.

SIGNED this 4 day of Oct, 2001.

FILED IN
COURT OF CRIMINAL APPEALS

NOV 07 2001

Troy C. Bennett, Jr., Clerk


HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

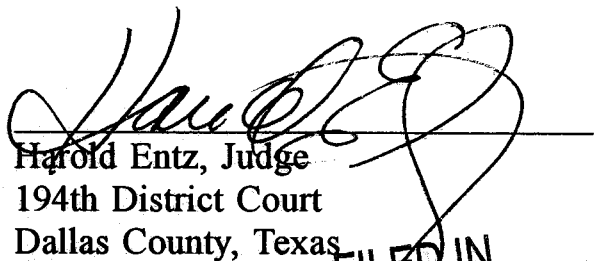
F00-02424-M

THE STATE OF TEXAS : IN THE 194TH JUDICIAL
V. : DISTRICT COURT
JEDIDIAH ISAAC MURPHY : DALLAS COUNTY, TEXAS

ORDER REMOVING COUNSEL

Subsequent to the Court appointing the Hon. James A. Johnston, Jr., Dallas, TX, telephone no. 214-939-9232 to represent Jedidiah Isaac Murphy pursuant to Article 11.071 C.C.P., counsel apprised the Court that he had withdrawn his name from the list of attorneys authorized to represent indigent defendants in capital habeas corpus writs, therefore James A. Johnston, Jr. is removed as Attorney of Record for Jedidiah Isaac Murphy and the Hon. Robert Abbot is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure.

Signed this the 4th day of October, A.D., 2001.


Harold Entz, Judge
194th District Court
Dallas County, Texas

FILED IN
COURT OF CRIMINAL APPEALS

NOV 07 2001

Troy C. Bennett, Jr., Clerk

September 19, 2001

James A. Johnston
3301 Elm St.
Dallas, TX 75226

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

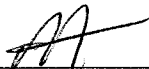
Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

The order appointing, James A. Johnston, Jr., counsel pursuant to Article 11.071, V.A.C.C.P. in the above styled and numbered cause has been received and approved by the Court.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

7:1145

F-00-02424-M

THE STATE OF TEXAS

§

IN THE 194TH JUDICIAL

v.

§

DISTRICT COURT

JEDIDIAH ISAAC MURPHY

§

DALLAS COUNTY, TEXAS

ORDER APPOINTING COUNSEL
PURSUANT TO ARTICLE 11.071 C.C.P.

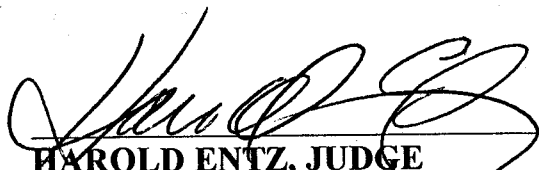
The Defendant having been convicted of capital murder and sentenced to death, it is the duty of this court pursuant to Article 11.071 Of the Code of Criminal Procedure to appoint counsel for the purpose of preparing and filing a writ of habeas corpus on the defendant's behalf; and

The Court, having determined that the Defendant is indigent;

IT IS THEREFORE ORDERED that the Honorable JAS. A. JOHNSON, JR., telephone no. 214-939-9232 is hereby appointed to represent the Defendant for the purpose of a writ of habeas corpus pursuant to Article 11.071 Of the Code of Criminal Procedure.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately send a copy of the judgment in this case along with a copy of this order to the Court of Criminal Appeals in Austin, Texas.

SIGNED this 12 day of September, 2001.


HAROLD ENTZ, JUDGE
194TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

FILED IN
COURT OF CRIMINAL APPEALS

SEP 19 2001

Troy C. Bennett, Jr., Clerk

THE STATE OF TEXAS
VS.
JEDIDIAH ISAAE MURPHY

IN THE 194TH JUDICIAL DISTRICT
COURT OF
DALLAS COUNTY, TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

JULY TERM, A.D., 2001
DATE OF JUDGMENT: 06/30/01
JUDGE PRESIDING: HAROLD ENTZ

ATTORNEY FOR STATE: GREG DAVIS/MARY MILLER
ATTORNEY FOR DEFENDANT: JANE LITTLE, MICHAEL BYCK & JENNIFER BALIDO

OFFENSE
CONVICTED OF: CAPITAL MURDER

DEGREE: A CAPITAL FELONY
DATE OFFENSE COMMITTED: 10/04/00

CHARGING
INSTRUMENT: INDICTMENT
PLEA: NOT GUILTY

JURY VERDICT: GUILTY
FOREMAN: NICHOLE MARIE BRISCOE

PLEA TO ENHANCEMENT
PARAGRAPH(S): N/A
FINDINGS ON
ENHANCEMENT: N/A

FINDINGS ON
DEADLY WEAPON, THE JURY FINDS THAT DEFENDANT HEREIN USED OR EXHIBITED
BIAS OR PREJUDICE, A DEADLY WEAPON DURING THE COMMISSION OF SAID
AND/OR OFFENSE TO-WIT: FIREARM.
FAMILY VIOLENCE:

PUNISHMENT
ASSESSED BY: JURY - SEE SPECIAL ISSUES ATTACHED HERETO AND
INCORPORATED BY REFERENCE.

DATE SENTENCE
IMPOSED: 06/30/01
COSTS: YES

PUNISHMENT AND DEATH
PLACE OF
CONFINEMENT: CONFINEMENT IN THE INSTITUTIONAL DIVISION DATE TO
OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE COMMENCE: 06/30/01
AND A FINE OF - 0 -

TIME CREDITED: 101600-063001
RESTITUTION/REPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

ON THIS DAY, SET FORTH ABOVE, THE ABOVE STYLED AND NUMBERED CAUSE CAME TO TRIAL. THE STATE OF TEXAS, DEFENDANT, APPEARED BY THE ABOVE-NAMED ATTORNEYS AND ANNOUNCED READY FOR TRIAL. DEFENDANT APPEARED IN PERSON IN OPEN COURT. WHERE DEFENDANT WAS NOT REPRESENTED BY COUNSEL, DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE RIGHT TO REPRESENTATION BY COUNSEL. WHERE SHOWN ABOVE THAT THE CHARGING INSTRUMENT WAS BY INFORMATION INSTEAD OF INDICTMENT, THE DEFENDANT DID, WITH THE CONSENT AND APPROVAL OF HIS ATTORNEY WAIVE HIS RIGHT TO PROSECUTION BY INDICTMENT AND AGREE TO BE TRIED ON AN INFORMATION. ALL SUCH WAIVERS, AGREEMENTS AND CONSENTS WERE IN WRITING AND FILED IN THE PAPERS OF THIS CAUSE PRIOR TO THE DEFENDANT ENTERING HIS PLEA HEREIN. DEFENDANT IN OPEN COURT WAS DULY ARRAIGNED, AND ENTERED THE ABOVE SHOWN PLEA. WHERE SHOWN ABOVE THAT DEFENDANT ENTERED A PLEA OF GUILTY, DEFENDANT WAS ADMONISHED BY THE COURT OF THE CONSEQUENCES OF THE SAID PLEA AND DEFENDANT PERSISTED IN ENTERING SAID PLEA, AND IT PLAINLY APPEARING TO THE COURT THAT DEFENDANT IS MENTALLY COMPETENT AND SAID PLEA IS FREE AND VOLUNTARY, THE SAID PLEA WAS ACCEPTED BY THE COURT AND IS NOW ENTERED OF RECORD AS THE PLEA HEREIN OF DEFENDANT. THEREUPON A JURY WAS DULY SELECTED, IMPANELED AND SWORN, WHO, HAVING HEARD THE CHARGING INSTRUMENT, AS SHOWN ABOVE PRESENTED, AND DEFENDANT'S PLEA THERETO, AND HAVING HEARD THE EVIDENCE SUBMITTED, AND HAVING BEEN DULY CHARGED BY THE COURT AS TO THEIR DUTY TO DETERMINE THE GUILT OR INNOCENCE OF THE DEFENDANT AND AFTER HAVING HEARD THE ARGUMENTS OF COUNSEL, RETIRED IN CHARGE OF THE PROPER OFFICER TO CONSIDER OF THEIR VERDICT, AND AFTERWARD WERE BROUGHT INTO OPEN COURT, BY THE PROPER OFFICER, DEFENDANT AND HIS COUNSEL BEING PRESENT, AND IN DUE FORM OF LAW RETURNED INTO OPEN COURT THE ABOVE SHOWN VERDICT, WHICH WAS RECEIVED AND ACCEPTED BY THE COURT, AND IS HERE AND NOW ENTERED UPON THE MINUTES OF THE COURT.

AND WHEN SHOWN ABOVE THAT THE CHARGING INSTRUMENT CONTAINS ENHANCEMENT PARAGRAPHS(S), WHICH WERE NOT WAIVED OR DISMISSED, THE COURT, AFTER HEARING THE DEFENDANT'S PLEA TO SAID PARAGRAPH(S) AS SET OUT ABOVE AND, AFTER HEARING FURTHER EVIDENCE ON THE ISSUE OF PUNISHMENT, THE COURT, OR JURY, MAKES ITS FINDING AS SET OUT ABOVE; IF TRUE, THE COURT, OR JURY, IS OF THE OPINION AND FINDS DEFENDANT HAS BEEN HERETOFORE CONVICTED OF SAID OFFENSE(S) ALLEGED IN THE SAID ENHANCEMENT PARAGRAPH(S) AS MAY BE SHOWN ABOVE.

WHEN IT IS SHOWN ABOVE THE DEFENDANT IS GUILTY OF THE OFFENSE SET FORTH ABOVE, IT IS CONSIDERED BY THE COURT THAT SAID DEFENDANT IS ADJUDGED TO BE GUILTY OF THE OFFENSE SET FORTH ABOVE, AND THAT DEFENDANT COMMITTED THE OFFENSE ON THE DATE SET FORTH ABOVE AS CHARGED IN THE INSTRUMENT SHOWN ABOVE, AND THAT DEFENDANT WAS PREVIOUSLY CONVICTED WHEN SHOWN ABOVE IN THE MANNER ABOVE, AND THAT SAID DEFENDANT BE PUNISHED AS HAS BEEN DETERMINED, SAID PUNISHMENT BEING ASSESSED BY THE ABOVE SHOWN ASSESSOR OF PUNISHMENT, AS ELECTED IN WRITING BY DEFENDANT, AND BE CONFINED IN THE PLACE OF CONFINEMENT SHOWN ABOVE FOR THE TERM OF TIME SET FORTH ABOVE, AND THAT THE STATE OF TEXAS DO HAVE AND RECOVER OF THE SAID DEFENDANT ALL COSTS IN THIS PROSECUTION EXPENDED INCLUDING ANY FINE SHOWN FOR WHICH LET EXECUTION ISSUE. THE COURT FURTHER MAKES ITS FINDING AS TO DEADLY WEAPON AS SET FORTH ABOVE BASED UPON THE JURY'S VERDICT OR THE FINDINGS OF THE COURT WHEN PUNISHMENT FIXED BY THE COURT. THE COURT MAKES ITS FINDINGS AS TO FAMILY VIOLENCE AND BIAS OR PREJUDICE AS SET FORTH ABOVE.

WHEN IT IS SHOWN ABOVE THAT RESTITUTION HAS BEEN ORDERED, BUT THE COURT DETERMINES THAT THE INCLUSION OF THE VICTIM'S NAME AND ADDRESS IN THE JUDGMENT IS NOT IN THE BEST INTEREST OF THE VICTIM, THE PERSON OR AGENCY WHOSE NAME AND ADDRESS IS SET OUT IN THIS JUDGMENT WILL ACCEPT AND FORWARD THE RESTITUTION PAYMENTS TO THE VICTIM.

AND WHEN IT IS SHOWN BELOW THAT PAYMENT OF THE COSTS OF LEGAL SERVICES PROVIDED TO THE DEFENDANT IN THIS CAUSE HAS BEEN ORDERED, THE COURT FINDS THAT THE DEFENDANT HAS THE FINANCIAL RESOURCES TO ENABLE THE DEFENDANT TO OFFSET SAID COSTS IN THE AMOUNT ORDERED.

THEREUPON THE SAID DEFENDANT WAS ASKED BY THE COURT WHETHER HE HAD ANYTHING TO SAY WHY SAID SENTENCE SHOULD NOT BE PRONOUNCED AGAINST HIM, AND HE ANSWERED NOTHING IN BAR THEREOF, AND IT APPEARING TO THE COURT THAT THE DEFENDANT IS MENTALLY COMPETENT AND UNDERSTANDING OF THE PROCEEDINGS.

IT IS, THEREFORE, CONSIDERED AND ORDERED BY THE COURT, IN THE PRESENCE OF DEFENDANT, AND HIS ATTORNEY, THAT SAID JUDGMENT AS SET FORTH ABOVE, IS HEREBY IN ALL THINGS APPROVED AND CONFIRMED, AND THAT DEFENDANT, WHO HAS

BEEN ADJUDGED GUILTY OF THE ABOVE NAMED OFFENSE, AS SHOWN ABOVE, AND WHOSE PUNISHMENT HAS BEEN ASSESSED BY THE COURT OR THE JURY AS SHOWN ABOVE, THAT SAID DEFENDANT BE PUNISHED IN ACCORDANCE WITH THE PUNISHMENT SET FORTH ABOVE, AND THAT DEFENDANT SHALL BE DELIVERED BY THE SHERIFF TO THE DIRECTOR OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, OR OTHER PERSON LEGALLY AUTHORIZED TO RECEIVE SUCH CONVICTS FOR THE PUNISHMENT ASSESSED HEREIN, AND SAID DEFENDANT SHALL BE CONFINED FOR THE ABOVE-NAMED TERM IN ACCORDANCE WITH THE PROVISIONS OF LAW GOVERNING SUCH PUNISHMENTS. IT IS FURTHER ORDERED THAT THE DEFENDANT PAY THE FINE, COURT COSTS, COSTS AND EXPENSES OF LEGAL SERVICES PROVIDED BY THE COURT APPOINTED ATTORNEY IN THIS CAUSE, IF ANY, AND RESTITUTION OR REPARATION, AS SET FORTH HEREIN, FOR WHICH LET EXECUTION ISSUE.

DEFENDANT IS HEREBY ORDERED REMANDED TO JAIL UNTIL SAID SHERIFF CAN OBEY THE DIRECTIONS OF THE JUDGMENT.

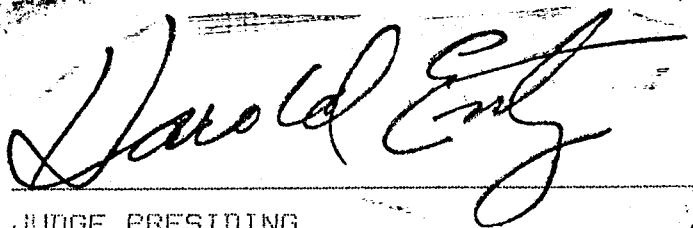
FOLLOWING THE DISPOSITION OF THIS CAUSE THE DEFENDANT'S FINGERPRINT WAS, IN OPEN COURT, PLACED UPON A CERTIFICATE OF FINGERPRINT. SAID CERTIFICATE IS ATTACHED HERETO AND IS INCORPORATED BY REFERENCE AS A PART OF THIS JUDGMENT.

WHEN REQUIRED, A PRESENTENCE INVESTIGATION WAS CONDUCTED IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF LAW.

DEFENDANT EXCEPTS AND GIVES NOTICE OF APPEAL TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS AT DALLAS.

COURT COSTS IN THE AMOUNT OF \$242.25

*Immediately upon release, defendant must report in person to the Felony Collections Dept., 2nd fl., Rm. C2-3, Crowley Courts Bldg., Dallas, TX, for payment arrangement of court ordered costs, fines and/or attorney fees.



JUDGE PRESIDING

JUDGMENT

CERTIFICATE OF THUMBPRINT

CAUSE NO. FOO 02424M

THE STATE OF TEXAS

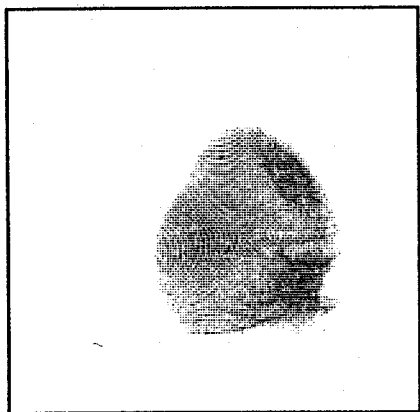
IN THE 194th

JUDICIAL DISTRICT COURT

DALLAS COUNTY, TEXAS

VS.

VED/DIAH / SAAC / MORPHY



Right
Thumb*



Defendant's RIGHT hand

THIS IS TO CERTIFY THAT THE FINGERPRINTS ABOVE ARE THE ABOVE-NAMED DEFENDANT'S FINGERPRINTS TAKEN AT THE TIME OF DISPOSITION OF THE ABOVE STYLED AND NUMBERED CAUSE.

DONE IN COURT THIS 30 DAY OF June, 2001.

[Signature]
BAILIFF/DEPUTY SHERIFF

*Indicate here if print other than defendant's right thumbprint is placed in box:

☐ left thumbprint

☐ left/right index finger

☐ other, _____

IN THE 194TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS.

CAUSE NO. F00-02424-M

JEDIDIAH ISAAC MURPHY

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, Jedidiah Isaac Murphy, has been found guilty by you of the offense of capital murder. You are instructed that a sentence of life confinement or death is mandatory on conviction for capital murder. In order for the Court to assess the proper punishment, two questions or special issues are submitted to you. Before answering these questions or special issues, you will consider the following instructions:

The burden of proof in this phase of the trial is on the State as to Special Issue 1; and the State has the burden of proof to prove beyond a reasonable doubt that the answer to Special Issue 1 submitted to the jury should be "Yes". The jury may not answer the Special Issue 1 "Yes" unless the jury agrees unanimously on such answer. Further, you may not answer this Special Issue 1 "No" unless (10) or more jurors agree. It is not necessary that members of the jury agree on what particular evidence supports a negative answer - that is, an answer of "No" - to Special Issue 1.

Special Issue 1 has been submitted to you requiring the State to prove the issue beyond a reasonable doubt, and on the issue of reasonable doubt you are instructed as follows:

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that makes a reasonable person hesitate to act in the most important of his affairs.

Proof beyond a reasonable doubt must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event that you have a reasonable doubt as to the issue under consideration by you, you will find against the State on that issue and not consider the testimony relating to that issue for any purpose.

The jury may not answer Special Issue 2 "No" unless the jury agrees unanimously on such answer. The jury may not answer Special Issue 2 "Yes" unless ten or more jurors agree. It is not necessary that members of the jury agree on what particular evidence supports an affirmative answer - that is, an answer of "Yes" - to Special Issue 2. In arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

In answering the Special Issues hereinafter submitted, you may consider all of the evidence admitted during the first phase of the trial, before your verdict of guilty, as well as all of the evidence admitted during the second phase of the trial.

In arriving at the answers to the issues submitted, it will not be proper for you to fix the same by lot or chance or any other method than a full, fair, and free exchange of the opinion of each individual juror.

You are further instructed that if there is testimony before you in this case regarding the defendant having committed other acts or participated in other transactions other than the offense alleged against him in the indictment in this case, that you cannot consider such other acts or transactions, if any, unless you first find beyond a reasonable doubt, as that term has heretofore been defined, that the defendant committed such acts or participated in such transactions, if any, but if you do not so believe, or if you have a reasonable doubt thereof, you will not consider such testimony for any purpose.

In deciding whether the defendant committed any alleged unadjudicated extraneous offenses or bad acts, the jury must not consider the fact that the defendant committed the capital murder alleged in the indictment. That is, you should not presume that the defendant has a propensity to commit

criminal acts generally, merely because you have convicted him of capital murder. The state must prove to you that the defendant committed any unadjudicated extraneous offense beyond a reasonable doubt.

Furthermore, if you find that the defendant committed one or more unadjudicated extraneous offenses, you must not consider that fact in deciding whether he committed other unadjudicated extraneous offenses alleged by the state.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant; and, in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the defendant has elected not to testify; and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against him.

Under the law applicable in this case, if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to

this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in considering all the evidence before you and in answering the special issues.

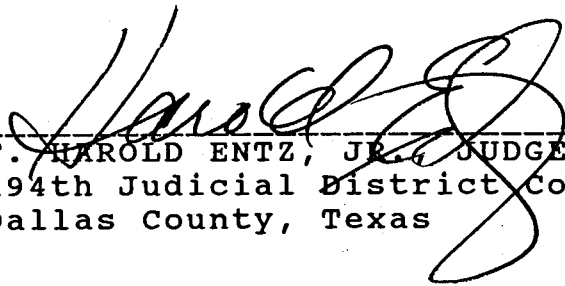
After reading this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answers to the issues submitted to you. It is the duty of your presiding juror to preside in the jury room and vote with you on the answers to the issues submitted.

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are

not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

After you have retired, you may communicate with this Court in writing through the bailiff who has you in charge. Your written communication must be signed by the presiding juror. Do not attempt to talk to the bailiff, the attorneys, or the Court regarding any question you may have concerning the trial of the case. After you have reached a verdict or if you desire to communicate with the Court, please use the jury call button on the wall and one of the bailiffs will respond.



F. HAROLD ENTZ, JR., JUDGE
194th Judicial District Court
Dallas County, Texas

FILED

2001 JUN 30 AM 8:51

JIM HAMLIN

DISTRICT CLERK

DALLAS CO., TEXAS

DEPUTY

The Special Issues, with the forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE NO. 1

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."


Presiding Juror

We, the Jury because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this special issue is "No."

Presiding Juror

You are to answer the following issue only if you have returned an affirmative finding on Special Issue No. 1 above.

Concerning Special Issue 2, you are instructed that neither the Defendant nor the State bears the burden to prove or disprove the existence of mitigating circumstances. Neither does our law assign a standard of proof on the existence of mitigating circumstances.

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

You are instructed that in answering this issue, you shall answer this issue "Yes" or "No." You may not answer the issue "No" unless the jury unanimously agree, and you may not answer the issue "Yes" unless ten or more jurors agree. The jury need not agree on what particular evidence supports an affirmative finding on this issue. The jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

ANSWER TO SPECIAL ISSUE NO. 2

We, the Jury, unanimously find that the answer to this Special Issue is "No."

Nichole Marie Briscoe
Presiding Juror

We, the Jury, because at least ten (10) jurors agree as to the matter inquired about in this Special Issue, find that the answer to this Special Issue is "Yes."

Presiding Juror

VERDICT OF THE JURY

We, the Jury, having answered the foregoing issues, return the same into Court as our verdict.

Nichole Marie Briscoe
Presiding Juror



DALLAS COUNTY
DISTRICT ATTORNEY
BILL HILL

February 14, 2003

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308
Capitol Station
Austin, Texas 78711

74115

FILED IN
COURT OF CRIMINAL APPEALS

FEB 18 2003

Re: *Jedidiah Isaac Murphy v. State*
No. 74,145

Troy C. Bennett, Jr., Clerk

Mr. Bennett:

The State files this supplemental letter brief to correct an assertion the State made in its previously filed brief in response to appellant's tenth point of error.

In his tenth point of error, appellant complained that the trial court failed to file findings of fact and conclusions of law as required by article 38.22, section 6 of the criminal procedure code. On June 6, 2002, this Court ordered the trial court to prepare and file such findings. The Court also ordered the trial court clerk to prepare and forward a supplemental clerk's record containing the findings and conclusions.

The undersigned counsel for the State responded to appellant's tenth point of error believing this Court had received a supplemental clerk's record containing the court's findings and conclusions. Counsel has since learned that, instead of forwarding a supplemental record, the trial court sent this Court a letter on June 24, 2003, citing the location in the previously filed reporter's record where the findings and conclusions may be found.

In short, the trial court chose to dictate its findings and conclusions to the court reporter during trial rather than prepare a separate written order. (RR48: 74-75). That recitation satisfies the requirements of article 38.22, section 6. *See Parr v. State*, 658 S.W.2d 620 (Tex. Crim. App. 1983). Therefore, notwithstanding this correction, the State still maintains appellant's tenth point of error is moot.

ORIGINAL

Respectfully submitted,

A handwritten signature in black ink that reads "Lisa B. Smith". The signature is written in a cursive style with a large, flowing "L" and "S".

Lisa Braxton Smith
Assistant District Attorney
Dallas County
SBT 00787131

c: Adam Seidel
Chateau Plaza, Suite 1400
2515 McKinney Ave.
Dallas, Texas 75201

ADAM L. SEIDEL
ATTORNEY AND COUNSELOR AT LAW
CHATEAU PLAZA, SUITE 1400
2515 MCKINNEY AVENUE
DALLAS, TEXAS 75201

BOARD CERTIFIED IN CRIMINAL LAW BY THE
TEXAS BOARD OF LEGAL SPECIALIZATION AND
BY THE NATIONAL BOARD OF TRIAL ADVOCACY

OFFICE 214-528-3344
FACSIMILE 214-528-3377

February 13, 2002

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711

Re: No. 74,145; Jedidiah Murphy v. State

Dear Mr. Bennett:

Please be advised that Appellant desires oral argument in the above referenced case, and intends to argue Points of Error Nos. 1 and 10 raised in Appellant's Brief.

FILED IN
COURT OF CRIMINAL APPEALS

FEB 19 2003

Troy C. Bennett, Jr., Clerk

Sincerely yours,



Adam L. Seidel

cc: Bill Hill
District Attorney



DALLAS COUNTY
DISTRICT ATTORNEY
BILL HILL

February 14, 2003

Honorable Troy Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711-2548

Re: *Jedidiah Isaac Murphy v. State*
Appeal No. 74,145

FILED IN
COURT OF CRIMINAL APPEALS

FEB 18 2003

Troy C. Bennett, Jr., Clerk

Mr. Bennett:

The State requests oral argument in the above-cited case scheduled for submission on March 6, 2003 at 1:30 p.m. Counsel for the State will argue only those issues that defense counsel expresses his intent to focus on.

Sincerely,

A handwritten signature in cursive script that reads "Lisa B. Smith".

Lisa Braxton Smith
SBT# 00787131
Assistant District Attorney
Appellate Division
Dallas County, Texas

cc: Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75201



SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

TROY C. BENNETT, JR.
CLERK
512 463-1551

RICHARD E. WETZEL
GENERAL COUNSEL
512 463-1600

FEBRUARY 6, 2003

ADAM L. SEIDEL
ATTORNEY AT LAW
2515 MCKINNEY AVENUE
DALLAS, TEXAS 75201

BILL HILL
DISTRICT ATTORNEY
133 N. INDUSTRIAL BLVD LB 19
DALLAS, TEXAS 75207-4399

No. 74,145
Trial Court No. F00-2424-M

STYLED: JEDIDIAH ISAAC MURPHY V. THE STATE OF TEXAS

Dear Counselors:

The above case is set for submission to the Court on **THURSDAY, MARCH 6, 2003 at 1:30 P.M.** *The Court will be hearing oral arguments at the SMU School of Law.*

ORAL ARGUMENT IS PERMITTED.

All parties **shall** notify the Clerk of this Court, in writing, within **10 days** after the date of this notice, **whether or not** oral argument is desired. **If oral argument is desired, a party must include in this notice which points of error will be argued.**

Requesting arguments on briefs or pleadings is NOT sufficient. FAILURE TO SEND THE PROPER WRITTEN REQUEST WITHIN THE TIME PERIOD SET OUT ABOVE WILL CONSTITUTE A WAIVER OF ORAL ARGUMENT. You will not be further contacted regarding this matter.


-2-

Twenty minutes will be permitted for each party properly requesting oral argument. Oral argument is not the Court's first exposure to a case as bench memorandums setting forth the points of error, the authorities relied upon, the facts, etc. are prepared for each argued case and distributed to every judge. Prepare your argument with this in mind. **The Court appreciates brevity.**

Sincerely,

TROY C. BENNETT, JR.

Clerk

By: 
Chief Deputy Clerk

cc: Judge Presiding
Jim Hamlin
Robert P. Abbott

WORK COPY



DALLAS COUNTY
DISTRICT ATTORNEY
BILL HILL

February 14, 2003

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals
P.O. Box 12308
Capitol Station
Austin, Texas 78711

Re: *Jedidiah Isaac Murphy v. State*
No. 74,145

Mr. Bennett:

The State files this supplemental letter brief to correct an assertion the State made in its previously filed brief in response to appellant's tenth point of error.

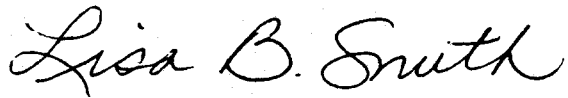
In his tenth point of error, appellant complained that the trial court failed to file findings of fact and conclusions of law as required by article 38.22, section 6 of the criminal procedure code. On June 6, 2002, this Court ordered the trial court to prepare and file such findings. The Court also ordered the trial court clerk to prepare and forward a supplemental clerk's record containing the findings and conclusions.

The undersigned counsel for the State responded to appellant's tenth point of error believing this Court had received a supplemental clerk's record containing the court's findings and conclusions. Counsel has since learned that, instead of forwarding a supplemental record, the trial court sent this Court a letter on June 24, 2003, citing the location in the previously filed reporter's record where the findings and conclusions may be found.

In short, the trial court chose to dictate its findings and conclusions to the court reporter during trial rather than prepare a separate written order. (RR48: 74-75). That recitation satisfies the requirements of article 38.22, section 6. *See Parr v. State*, 658 S.W.2d 620 (Tex. Crim. App. 1983). Therefore, notwithstanding this correction, the State still maintains appellant's tenth point of error is moot.

COPY

Respectfully submitted,

A handwritten signature in black ink that reads "Lisa B. Smith". The signature is written in a cursive, flowing style.

Lisa Braxton Smith
Assistant District Attorney
Dallas County
SBT 00787131

c: Adam Seidel
Chateau Plaza, Suite 1400
2515 McKinney Ave.
Dallas, Texas 75201

July 30, 2002

Robert P. Abbott
120 S Denton Tap Road
Suite 450C-188
Coppell, TX 75019-3225

Adam L. Seidel
Chateau Plaza
Suite 1400
2515 McKinney Avenue
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

Style: MURPHY, JEDIDIAH ISAAC

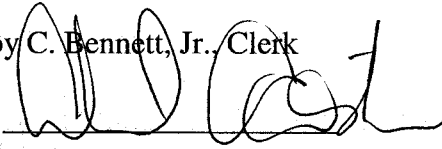
Dear Counsel:

ORDER

The State's Motion for Extension of time within which to file the State's brief was granted. The time for filing the state's brief has been extended to 12-20-02.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Bill Hill

NO. 74,145

JEDIDIAH MURPHY § IN THE TEXAS COURT OF
V. § CRIMINAL APPEALS
THE STATE OF TEXAS § AT AUSTIN, TEXAS

STATE'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF

TO THE HONORABLE JUDGES OF SAID COURT:

THE STATE OF TEXAS, by and through the Criminal District Attorney of Dallas County, respectfully requests that the time for filing the State's brief be extended. In support of this motion, the State would show the following:

I.

Appellant was convicted of capital murder in the 194th Judicial District Court of Dallas County, Texas, and sentenced to death. Appeal to this Court is automatic. Appellant filed his brief on June 27, 2002, and the State's brief is due on July 27, 2002.

II.

The State requests an extension of time of 146 days, until December 20, 2002. No previous extension of time has been requested by the State in this case.

III.

The State relies on the following grounds to reasonably explain its need for an extension:

FILED IN
COURT OF CRIMINAL APPEALS

JUL 30 2002

Troy C. Bennett, Jr., Clerk

ORIGINAL

(1) Since appellant filed his brief, undersigned counsel has prepared the State's response direct appeal brief in *Hugo Ordonez Tapia v. State* (05-01-01675-CR), *Arturo Lopez v. State* (05-01-01869 through 05-01-01873-CR), and *John Edwards v. State* (08-01-00417-CR).

(2) Counsel must file the State's brief in *Tarrance Whitlock v. State* (0066-42) in which this Court granted petition for discretionary review. The State's response is due July 31, 2002.

(3) Counsel is currently assigned to prepare the State's brief on direct appeal in *Eric Ray Martinez v. State* (05-01-01770-CR and 05-01-01771-CR), due August 16, 2002.

(4) Counsel must prepare the State's response to applicant's original application for writ of habeas corpus in *Leon David Dorsey v. State* (W98-69472-L(A)), a death penalty case. Undersigned counsel anticipates the State's writ response in this case will be due November 29, 2002.

(5) Counsel reviews Governor's warrants for the extradition of fugitives and represents the State at hearings concerning applications for writs of habeas corpus concerning extraditions. Counsel reviews several warrants a month and cannot anticipate or predict the number of cases requiring a hearing.

(6) Lastly, counsel is assisting in the prosecution of Joseph Garcia, one of the seven Texas prison escapees charged with the Christmas Eve murder of Irving police officer Aubrey Hawkins. Jury selection in *Joseph Garcia v. State* is scheduled to begin in November 2002.

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests that the time for filing the State's brief be extended until December 20, 2002.

Respectfully submitted,

By: *Lisa B. Smith*

Lisa Braxton Smith
Assistant District Attorney
State Bar No. 00787131
Frank Crowley Courts Bldg,
133 N. Industrial Blvd., LB 19
Dallas, Texas 75207-4399
(214) 653-3638
(214) 653-3643 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this motion has been served on Adam Seidel, attorney for appellant, Chateau Plaza, Ste. 1400, Dallas, Texas 75201 by depositing same in the United States mail, postage paid, on July 23, 2002.

Lisa B. Smith
Lisa Braxton Smith

NO. 74,145

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

FILED IN
COURT OF CRIMINAL APPEALS

JUN 27 2002

Troy C. Bennett, Jr., Clerk

APPELLANT'S MOTION FOR
EXTENSION OF TIME TO FILE APPELLANT'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Appellant and respectfully requests that the Court extend the time for filing the Appellant's Brief, and would respectfully show the following:

I.

1. Trial Court: 194th Judicial District Court, Dallas County, Texas.
2. Date of Judgement and Sentence: June 30, 2001.
3. Trial Court Cause Number: F00-02424-M
4. Style of Cause: State v. Jedidiah Issac Murphy
5. Offense: Capital Murder.
6. Punishment Assessed: Death
7. Date Motion for New Trial Filed: July 27, 2001.
8. Date Notice of Appeal Filed: June 30, 2001.
9. Deadline For Filing Document: June 3, 2002.
10. Number of Extension Previously Granted: 1.

11. Facts relied upon to explain the need for an extension:

- a. On May 29, 2002, counsel mailed a motion to abate the appeal, seeking remand to the trial court for written findings of fact and conclusions of law. This Honorable Court granted the motion to abate, in part, by ordering the trial court judge to supplement the record. However, Appellant's Motion to Extend the deadline for filing Appellant's Brief was denied. Counsel then completed and mailed Appellant's Brief on June 24, 2002.

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Honorable Court grant the foregoing Motion and extend the time for filing Appellant's Brief.

Respectfully Submitted,



Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75219
ph. 214-237-0835
fax 214-237-0901
State Bar No. 17999290

COUNSEL FOR APPELLANT



SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

TROY C. BENNETT, JR.
CLERK
512 463-1551

RICHARD E. WETZEL
GENERAL COUNSEL
512 463-1600

Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75201

Dear Mr. Seidel:

Enclosed please find the trial court's response to this Court's order dated June 6, 2002. Please call if you have any questions.

Very truly yours,


Abel Acosta

Chief Deputy Clerk



HAROLD ENTZ, JUDGE

ONE HUNDRED NINETY FOURTH

JUDICIAL DISTRICT COURT

FRANK CROWLEY CRIMINAL COURTS BUILDING

133 NORTH INDUSTRIAL BOULEVARD, LB 28

DALLAS, TEXAS 75207-4313

RECEIVED IN
COURT OF CRIMINAL APPEALS

JUN 24 2002

June 19, 2002

Mr. Troy C. Bennett, Jr.
Clerk, Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, TX 78711

Troy C. Bennett, Jr., Clerk

RE: No. 74,145
Jedidiah Isaac Murphy v. The State of Texas

Members of the Court:

In response to your *per curiam* order dated June 6, 2002, I call your attention to Volume 48, pages 74 and 75.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Harold Entz", is written over the typed name. The signature is stylized with large, flowing loops.

F. Harold Entz

dkl/FHE



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 74,145

JEDIDIAH ISAAC MURPHY, Appellant

v.

THE STATE OF TEXAS

**ON DIRECT APPEAL
FROM DALLAS COUNTY**

The order was entered per curiam.

ORDER

The above-styled and numbered cause is pending before this Court as a result of appellant's capital murder conviction and resulting sentence of death in the 194th District Court of Dallas County, Cause No. F00-02424-NM, styled The State of Texas v. Jedidiah Isaac Murphy. Appellant has filed a motion to abate the appeal and remand for the trial court to file findings of fact and conclusions of law as required by Article 38.22, Section 6 of the Texas Code of Criminal Procedure.

Upon due consideration, appellant's motion is granted to the extent that the trial

Murphy – 2

court is directed to prepare and file findings of fact and conclusions of law as required by Article 38.22, Section 6. The trial court clerk must then prepare, certify, and file in this Court a supplemental clerk's record containing the findings and conclusions. This supplemental clerk's record is to be filed within 30 days of the date of this order. *See* TEX. R. APP. P. 34.5(c).

IT IS SO ORDERED THIS THE 6th DAY OF JUNE, 2002.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Court's Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, on this the 24th day of June 2002.

A handwritten signature in cursive script, appearing to read "Adam L. Seidel", is written over a horizontal line.

Adam L. Seidel

NO. 74,145

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

FILED IN
COURT OF CRIMINAL APPEALS

MAY 3 1 2002

Troy C. Bennett, Jr., Clerk

**APPELLANT'S MOTION TO ABATE APPEAL AND FOR
REMAND FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

COMES NOW Appellant Jedidiah Issac Murphy, by and through appointed counsel on appeal, and files this motion requesting that this appeal be abated and remanded to the trial court, and would respectfully show as follows:

I.

Prior to trial in this case, Appellant filed pretrial motions seeking to suppress oral statements made by Appellant after his arrest, as well as the written statement signed by Appellant while in police custody. (Clerk's Record, Vol. I, p.11). On June 5, 2001, the trial

court held a hearing outside the jury's presence in which evidence was presented regarding oral incriminating statements made by Appellant after his arrest, and regarding the written voluntary statement signed by Appellant while in police custody. Appellant testified and disputed the evidence offered by the State. (Reporter's Record, volumes 45 & 48). In Appellant's oral statements, he told officers where the complainant's body was located. In his written statement, he admitted shooting the complainant, but explained that the shooting was accidental. The trial court denied Appellant's motion to suppress the oral and written statements and the State offered the statements into evidence. However, the Clerk's Record contains no written findings of fact and conclusions of law entered by the trial court. Apparently, the trial court judge never made written findings of fact and conclusions of law resolving the disputed evidence related to Appellant's oral and written statements. Therefore, Appellant respectfully requests that the appeal be abated and the case be remanded to the trial court for findings of fact and conclusions of law with regard to the admissibility of 1.) the oral statements made by Appellant after he was arrested and placed in handcuffs, and 2.) the written statement signed by Appellant and offered into evidence as State's Exhibit No. 47.

II.

Applicable Law

The determination of whether a statement is voluntary is a mixed question of law and fact, i.e., an application of law to a fact question. *Garcia v. State*, 15 S.W.2d 533 (Tex. Crim. App. 2000).

TEX. CODE. CRIM. PROC. art. 38.22, § 6 provides in relevant part:

In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions. If the statement has been found to have been voluntarily made and held admissible as a matter of law and fact by the court in a hearing in the absence of the jury, the court must enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based, which order shall be filed among the papers of the cause.

“[D]etermination by the trial judge of the defendant's confession prior to its admission in evidence is a constitutional and statutory requirement, and such determination must distinctly appear in the record.” *McKittrick v. State*, 535 S.W.2d 873, 875 (Tex. Crim. App. 1976), *citing*, *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967); Article 38.22, § 6, V.A.C.C.P., *supra*. Article 38.22, § 6, *supra*, is mandatory in its language and requires a trial court to file its findings of fact and conclusions of law regarding the voluntariness of a confession whether or not the defendant objects to the absence of such omitted filing. *Wicker v. State*, 740 S.W.2d 779 (Tex. Crim. App. 1987), *cert. denied*, 485 U.S. 938, 108 S. Ct. 1117, 99 L. Ed. 2d 278 (1988), *citing*, *McKittrick v. State*, *supra*, at 876; *Dykes v. State*, 649 S.W.2d 633, 636 (Tex. Crim. App. 1983). The procedures used in the trial court to determine the voluntariness of a defendant's confession must “be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of the disputed facts upon which the voluntariness may depend.” *Jackson v.*

Denno, 378 U.S. at 391, 84 S. Ct. at 1788, 12 L. Ed. 2d at 924. In *Wicker*, this Court stated:

[w]hether the trial court files findings insufficient in detail to allow an appellate court to resolve the dispute upon which an appealing party predicates his appeal, as in *Hester v. State*, supra, and *Quinn v. State*, 558 S.W.2d 10 (Tex. Crim. App. 1977), or no findings are made to support the ruling of the trial court on the voluntariness issue, as in *Figueroa v. State*, 473 S.W.2d 202 (Tex. Crim. App. 1971); *Davis v. State*, 499 S.W.2d 303 (Tex. Crim. App. 1973) (opinion on original submission); *McKittrick v. State*, supra, the duty of the appellate court is clear. The proper procedure is that the appeal will be abated and the trial judge will be directed to reduce to writing his findings on the disputed issues surrounding the taking of appellant's confession. *McKittrick v. State*, supra, at 876; *Bonham v. State*, 644 S.W.2d 5, 8 (Tex. Crim. App. 1983).

Wicker, 740 S.W.2d at 784.

Appellant therefore respectfully requests that this Honorable Court abate this appeal and remand the case, ordering the trial court to enter findings of fact and conclusions of law with regard to the voluntariness of Appellant's oral and written statements, and that the record thereafter be supplemented with the written findings and conclusions made by the trial court judge.

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Court grant the foregoing motion to abate and remand this case to the trial court for entry of written findings of fact and conclusions of law.

Respectfully submitted,

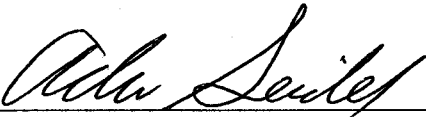
A handwritten signature in black ink, appearing to read "Adam L. Seidel". The signature is fluid and cursive, with a large, sweeping "S" for the last name.

Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75201
ph (214) 528-3344
fax (214) 528-3377
State Bar No. 17999290

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was mailed to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, on this the 29th day of May, 2002.


Adam L. Seidel

CERTIFICATE OF APPELLATE COUNSEL

I hereby certify that the foregoing motion was deposited postage prepaid in the United States Mail, first class, in an envelope properly addressed to the Clerk, Texas Court of Criminal Appeals, P.O. Box 12308, Capital Station, Austin, Texas, 78711, on this the 29th day of May, 2002.


Adam L. Seidel



SHARON KELLER
PRESIDING JUDGE

LAWRENCE E. MEYERS
TOM PRICE
PAUL WOMACK
CHERYL JOHNSON
MIKE KEASLER
BARBARA P. HERVEY
CHARLES R. HOLCOMB
CATHY COCHRAN
JUDGES

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

January 9, 2002

TROY C. BENNETT, JR.
CLERK
512 463-1551

RICHARD E. WETZEL
GENERAL COUNSEL
512 463-1600

Jedidiah Isaac Murphy
TDC #999392
Polunsky Unit
12002 FM 350 South
Livingston, TX 77351

Re: Our Cause No. 74,145

Dear Mr. Murphy:

The Court is in receipt of your correspondence dated January 2, 2002. The record on appeal in your capital murder conviction has been filed. The brief by your counsel is currently due on June 3, 2002.

The direct appeal of capital murder convictions is mandated by statute. An appeal must take place. Therefore, you will not be permitted to end the appellate proceedings.

In the event you no longer desire to be represented by counsel, arrangements can be made for you to represent yourself on appeal. In any case, you cannot waive the appeal.

Thank you for your attention and cooperation in this matter.

Sincerely,



Richard E. Wetzel
General Counsel

REW/bh

cc: Robert P. Abbott
Attorney at Law
120 South Denton Tap, Ste. 450-C-188
Coppell, TX 75019-3225

Bill Hill
Attn: Lori Ordiway
District Attorney
Dallas County
Appellate Section
133 N. Industrial, LB 19
Dallas, TX 75207

June 5, 2002

Robert P. Abbott
120 S Denton Tap Road
Suite 450C-188
Coppell, TX 75019-3225

Adam L. Seidel
Chateau Plaza
Suite 1400
2515 McKinney Avenue
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

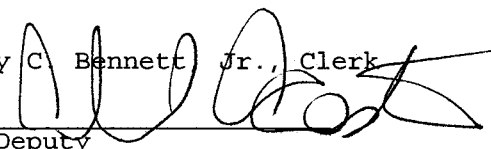
Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

The Appellant's motion for extension of time within
which to file the appellant's brief is denied.

Sincerely yours,

Troy C. Bennett Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Bill Hill

DENIED
6-5-02
P.C.

NO. 74,145

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

FILED IN
COURT OF CRIMINAL APPEALS

JUN 5 2002

Troy C. Bennett, Jr., Clerk

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

**APPELLANT'S SECOND MOTION FOR
EXTENSION OF TIME TO FILE APPELLANT'S BRIEF**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Appellant and respectfully requests that the Court extend the
time for filing the Appellant's Brief, and would respectfully show the following:

I.

1. Trial Court: 194th Judicial District Court, Dallas County, Texas.
2. Date of Judgement and Sentence: June 30, 2001.
3. Trial Court Cause Number: F00-02424-M
4. Style of Cause: State v. Jedidiah Issac Murphy
5. Offense: Capital Murder.
6. Punishment Assessed: Death
7. Date Motion for New Trial Filed: July 27, 2001.
8. Date Notice of Appeal Filed: June 30, 2001.
9. Deadline For Filing Document: June 3, 2002.
10. Number of Extension Previously Granted: 1.

11. Facts relied upon to explain the need for an extension:

- a. On May 29, 2002, counsel mailed a motion to abate the appeal, seeking remand to the trial court for written findings of fact and conclusions of law. Appellant therefore seeks an extension of time in which to file Appellant's Brief to a time after which the trial court has supplemented the record in this case.

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Honorable Court grant the foregoing Motion and extend the time for filing Appellant's Brief.

Respectfully Submitted,



Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75219
ph. 214-237-0835
fax 214-237-0901
State Bar No. 17999290

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Court's Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, on this the 3rd day of June 2002.

A handwritten signature in cursive script, appearing to read "Adam L. Seidel", is written over a horizontal line.

Adam L. Seidel

Jedidiah I. Murphy
Polunsky Unit #999392
12002 F.M.350 South
Livingston, Texas 77351

Texas Court Of Criminal Appeals
Court Clerk, Troy C. Bennett, Jr.
Box 12308
Capital Station
Austin, Texas 78711

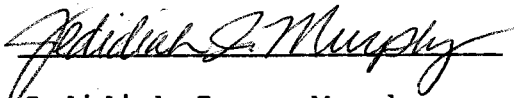
RE: Death Penalty Case
Nº. F00-02424-M

January 02, 2002

Mr. Bennett:

Counselor Robert P. Abbott has been appointed to represent my case on Direct Appeal. Enclosed is my letter to Counselor Abbott asking that these procedures end before they get too far along.

I think the letter is self-explanatory. Please see to it that the Judges be made aware of my decision. I thank you for your time and please notify me if there is anything ~~else~~ that I am required to do.


Jedidiah Isaac Murphy
T.D.C.J. #999392

CERTIFIED MAIL #7000 1670 0002 9511 5495

RECEIVED IN
COURT OF CRIMINAL APPEALS

JAN 8 2002

Troy C. Bennett, Jr., Clerk

g.w.

Mr. Jeddian M. My
Polunsky Unit #999392
12002 F.M.350 South
Livingston, Texas 77351

COPY

Honorable Robert P. Abbott
Attorney at Law
120 South Denton Tap, Suite 450C-188
Coppell, Texas 75019-3225

RE: Cause NO. F00-02424-M on Appeal
Notification of dismissal of appellate procedures

January 02, 2002

RECEIVED IN
COURT OF CRIMINAL APPEALS

Counselor Abbott:

This is a form letter that I am sending out to the respective addresses that I have listed on a separate page and have included in this envelope. JAN 8 2002

Troy C. Bennett, Jr., Clerk

With a sound mind, I have given my situation considerable thought and have reached the following conclusion; I wish to end these appellate proceedings so that my sentence of death, by lethal injection, may be carried out as soon as practicable.

I have underwent psychological and sociological evaluations to prove that I was competent to stand trial. Also, there is an I.Q. test that I took and scored at least average or better.

I submit this information for reference and proof as to my continued competence and that this request be carried out posthaste.

I wrote a confession to this crime at the very onset on any investigations. This confession was not used against my interests, nor was it ever entered as evidence. I refer to this statement to show that I have never tried to duck responsibility for my actions.

I have had my day in court. I was afforded the opportunity to testify. I was represented by competent counsel during trial proceedings. I had investigators assigned to my case. I was allowed to cross-examine all witnesses that were against me. I had a fair trial.

Being convicted of Capital Murder, a jury of my peers have decided that I deserve death by lethal injection. I am ready to accept their decision without further delay.

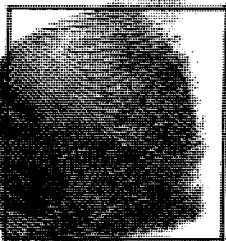
[If] any Motions are required to be entered to the Texas Court of Criminal Appeals on this matter, I do now authorize my respective appellate attorneys to do so on my behalf. I at least need to be notified, with expedience, that Motions are required in order to end these appellate procedures.

The above and foregoing are my thoughts and wishes. In no way have I been coerced nor am I under any duress from anyone concerning this decision. My signature and right thumb print below signifies authenticity of this letter.

CERTIFIED MAIL #7000 1670 0002 9511 5075

Jedidiah I. Murphy
Jedidiah Isaac Murphy
T.D.C.J. #999392

COPY



Right Thumb

g.w.

cc: TEXAS COURT OF CRIMINAL APPEALS
Court Clerk, Troy C. Bennett, Jr.
Box 12308
Capital Station
Austin, Texas 78711

Copy

Bill Hill
District Attorney Dallas County
Attn: Lori Ordiway
Appellate Section
133 N. Industrial, LB 19
Dallas, Texas 75207

Jim Hamlin
District Clerk Dallas County
Frank Crowley Courts Bldg.
133 N. Industrial Blvd. LB 12
Dallas, Texas 75207-4313

Gena Bunn
Assistant Attorney General
Capitol Litigation
Price Daniel, Sr. Building
Austin, Texas 78711

Honorable Harold Entz
Presiding Judge Criminal District Court#194
Dallas County
133 N. Industrial Blvd.
Dallas, Texas 75207

Adam L. Seidel P.C.
Appellate Counsel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75201

g.w.

November 5, 2001

James A. Johnston
3301 Elm St.
Dallas, TX 75226

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

I have this day received and filed the Clerk's Record in
the above-styled and numbered cause. The Reporter's Record is
due on 06-03-02.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

1-3-02
BANKS
6-3-02
PIL

NO. 74,145

In the

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

JEDIDIAH ISSAC MURPHY,
APPELLANT

VS.

THE STATE OF TEXAS,
APPELLEE

**MOTION FOR EXTENSION OF
TIME TO FILE APPELLANT'S BRIEF**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Appellant and respectfully requests that the Court extend the
time for filing the Appellant's Brief, and would respectfully show the following:

I.

1. Trial Court: 194th Judicial District Court, Dallas County, Texas.
2. Date of Judgement and Sentence: June 30, 2001.
3. Trial Court Cause Number: F00-02424-M
4. Style of Cause: State v. Jedidiah Issac Murphy
5. Offense: Capital Murder.
6. Punishment Assessed: Death
7. Date Motion for New Trial Filed: July 27, 2001.
8. Date Notice of Appeal Filed: June 30, 2001.
9. Deadline For Filing Document: January 4, 2002.
10. Length of Time Requested for Extension: 6 months.

**FILED IN
COURT OF CRIMINAL APPEALS**

JAN 3 2002

Troy C. Bennett, Jr., Clerk

11. Number of Extension Previously Granted: 0.
12. Facts relied upon to explain the need for an extension:
 - a. This is the direct appeal of a death penalty case. The reporter's record contains sixty-five volumes. Counsel asserts that the above requested extension of time is necessary to adequately review the entire record and prepare Appellant's Brief.

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Honorable Court grant the foregoing Motion and extend the time for filing Appellant's Brief to July 4, 2002.

Respectfully Submitted,



Adam L. Seidel
Chateau Plaza, Suite 1400
2515 McKinney Avenue
Dallas, Texas 75219
ph. 214-237-0835
fax 214-237-0901
State Bar No. 17999290

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail to the Appellate Division, Dallas County District Attorney's Office, Frank Crowley Court's Building, 133 N. Industrial Blvd., LB19, Dallas, Texas, 75207, on this the 28th day of December 2001.

A handwritten signature in black ink, appearing to read "Adam L. Seidel", is written over a horizontal line.

Adam L. Seidel

December 5, 2001

Robert P. Abbott
120 S Denton Tap Road
Suite 450C-188
Coppell, TX 75019-3225

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

I have this day received and filed the Reporter's Record in the above-styled and numbered cause. The appellant's brief is due on 01-04-02.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 

Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

11-05-01
GRANTED
12-3-01
f.l.



DARLINE W. LABAR, CSR
OFFICIAL COURT REPORTER
194TH JUDICIAL DISTRICT COURT
FRANK CROWLEY COURTS BUILDING
133 N. INDUSTRIAL BLVD. LB 26
DALLAS, TEXAS 75207-4313
(214) 653-5802
FAX (214) 653-5805

October 29th, 2001

Court of Criminal Appeals
Troy C. Bennett, Jr., Clerk
Supreme Court Building
201 W. 14th Street
Austin, Texas 78721

FILED IN
COURT OF CRIMINAL APPEALS

NOV 05 2001

RE: Extension for filing Reporter's Record
The State of Texas vs. Jedidiah Isaac Murphy
Trial Court Number F00-02424-NM

Troy C. Bennett, Jr., Clerk

Dear Mr. Bennett:

Please accept this letter as an Extension for filing the Reporter's Record in the above trial court cause number. The sentencing date on the above case was June 30th, 2001, with a Motion for New Trial Filed, making the Reporter's Record due October 29th, 2001.

This record is a death penalty capital murder trial and will be 65 Volumes, totalling approximately 6,400 pages. I have been unable to complete the record within the time allowed due to its size and other obligations. The record is in its final preparation and I would respectfully request until December 3rd, 2001 to file the reporter's record.

Sincerely,

A handwritten signature in cursive script that reads "Darline W. LaBar".

Darline W. LaBar, CSR

DEAR MR. BENNETT:

THE COURT REPORTER RECORD-03-12-01
THE STATE OF TEXAS vs. Jedidiah Isaac Murphy
idkl/file

November 5, 2001

James A. Johnston
3301 Elm St.
Dallas, TX 75226

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

The Motion for Extension of Time to File the Reporter's
Record has been granted. The time for filing has been extended
to 12-03-01.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

November 5, 2001

James A. Johnston
3301 Elm St.
Dallas, TX 75226

Adam L. Seidel
Chateau Plaza
Suite 1400
Dallas, TX 75201

RE: Case No. 74,145
194TH DISTRICT COURT - F00-02424-14

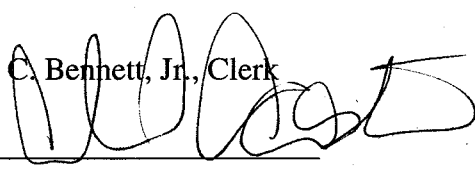
Style: MURPHY, JEDIDIAH ISAAC

Dear Counsel:

I have this day received and filed the Clerk's Record in
the above-styled and numbered cause.

Sincerely yours,

Troy C. Bennett, Jr., Clerk

By: 
Deputy

cc: Jim Hamlin
Judge Presiding
Darline W. King
Bill Hill

THE STATE OF TEXAS

LISA MATZ
CLERK, 5th DISTRICT

CAUSE NO.

LISA MATZ **DRAWER #40**
CLERK, 5th DISTRICT

Judicial DISTRICT COURT 194

DALLAS COUNTY, TEXAS

VS.

Jedidiah Isaac Murphy

FILED IN
COURT OF CRIMINAL APPEALS

DEFENDANT'S NOTICE OF APPEAL AND PAUPER OATH SEP 10 2001

APPOINTMENT OF ATTORNEY ON APPEAL Troy C. Bennett, Jr., Clerk

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant in the above cause and states: I am the defendant in the above cause; I was convicted in this cause and now give Notice of Appeal to the Texas Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, and that I am penniless, destitute and indigent person, too poor to employ counsel to represent me on the appeal, and too poor to pay for or give security for the Statement of Facts and a true copy thereof herein.

WHEREFORE, I pray that the Court will appoint an attorney to represent me in this appeal and that the Court will order the Court Reporter of this Court to prepare and deliver to me or my appointed Counsel the original and a true copy of the Statement of Facts in this case, together with all exhibits attached thereto if practical.

Jedidiah S. Murphy
Defendant

BEFORE ME, the undersigned authority, personally appeared the above Defendant, known to me to be the person whose signature appears above, and after being duly sworn on oath states that he is the defendant in the above cause, and that the matters and things set forth in the foregoing are true and correct in all things.

BILL LONG
DISTRICT CLERK
Dallas County, Texas

FILED
JUN 30 2001
JIM HAMLIN
DIST. CLERK, DALLAS CO., TEXAS
DEPUTY

By

Alexander
Deputy District Clerk

ORDER

214-237-0835

The Defendant having requested the Court to appoint Counsel,

It is Ordered the Honorable

ADAM SEIDEL

Address

2515 McKinney Suite 1400 Dallas, TX 75201

a regular licensed and practicing attorney of Texas, be, and he is hereby appointed to represent Defendant in prosecuting his appeal herein, and it is further Ordered that the Court Reporter is hereby directed to transcribe all of the notes as same may appertain to this cause and as taken during the trial of this cause which began on

February 26, 2001, and make Statement of Facts in duplicate and furnish same to Defendant or his appointed Counsel.

Harold E. [Signature]
Judge

Callen Adam
9/3/01
CLERK 40

RECEIVED IN

THE STATE OF TEXAS

COURT OF APPEALS, 5th DIST.

IN THE 194TH JUDICIAL DISTRICT
COURT
OF
DALLAS COUNTY, TEXAS

VS.

EDILIAH ISAAC MURPHY

AUG 21 2001

LISA MATZ
CLERK, 5th DISTRICT

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT OR JURY - NO PROBATION GRANTED

JUDGE PRESIDING: HAROLD ENTZ

JULY TERM, A.D., 2001

DATE OF JUDGMENT: 06/30/01

ATTORNEY
FOR STATE: GREG DAVIS/MARY MILLER

ATTORNEY
FOR DEFENDANT: JANE LITTLE, MICHAEL BYCK &
JESUS RALIDO

OFFENSE
CONVICTED OF: CAPITAL MURDER

FILED IN
COURT OF CRIMINAL APPEALS

SEP 10 2001

DEGREE: A CAPITAL FELONY

DATE OFFENSE COMMITTED: 10/04/00

Troy C. Bennett, Jr., Clerk

CHARGING
INSTRUMENT: INDICTMENT

PLEA: NOT GUILTY

JURY VERDICT: GUILTY

FOREMAN: NICHOLE MARIE BRISCOE

PLEA TO ENHANCEMENT
PARAGRAPH(S): N/A

FINDINGS ON
ENHANCEMENT: N/A

FINDINGS ON
DEADLY WEAPON,
BIAS OR PREJUDICE,
AND/OR
FAMILY VIOLENCE:

THE JURY FINDS THAT DEFENDANT HEREIN USED OR EXHIBITED
A DEADLY WEAPON DURING THE COMMISSION OF SAID
OFFENSE TO-WIT: FIREARM.

PUNISHMENT
ASSESSED BY:

JURY

- SEE SPECIAL ISSUES ATTACHED HERETO AND
INCORPORATED BY REFERENCE.

DATE SENTENCE
IMPOSED:

06/30/01

COSTS: YES

PUNISHMENT AND DEATH
PLACE OF

CONFINEMENT: CONFINEMENT IN THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND A FINE OF - 0 - DATE TO COMMENCE: 06/30/01

TIME CREDITED: 101600-063001

RESTITUTION/REPARATION: NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

FA

VOL. 475 PAGE 106

If any question call 214 712 3422

| | | | | | | | |
|------------------|-------------|--------|----------|-------|--------|-------|--|
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| Fax/Phone Number | Mode | Start | Time | Page | Result | Note | |

P.1 Aug 21 2001 8:58

** Transmit Conf. Report **



JIM HAMLIN
DALLAS COUNTY DISTRICT CLERK

FACSIMILE TRANSMISSION SHEET

Date: 8-21-01 Fax Number: _____

Company faxed to: 5th CT of APPEALS

Contact Person: KATHY HENDERSON

From: Jane Miller

Comments: As Requested - Judgment

Showing - Death -

Number of pages (excluding cover sheet): 1

If you do not receive all pages, please call (214) 653-5969.

133 North Industrial Blvd., Dallas, Texas 75207-4313
Telephone: (214) 653-5969 Fax: (214) 653-5986
E-Mail: jhamlin@dallascounty.org
Web Site: www.dallascounty.org/distclerk/index.html



FILED IN
COURT OF CRIMINAL APPEALS

**Court of Appeals
Fifth District of Texas at Dallas**

SEP 10 2001

Troy C. Bennett, Jr., Clerk

JUDGMENT

JEDIDIAH ISAAC MURPHY, Appellant

No. 05-01-01294-CR V.

THE STATE OF TEXAS, Appellee


Appeal from the 194th Judicial District Court
of Dallas County, Texas. (Tr.Ct.No. F00-
02424-M).

Opinion delivered by Justice FitzGerald,
Justices Kinkeade and Wright participating.

Based on the Court's opinion of this date, we **DISMISS** the appeal for want of jurisdiction.

The Clerk of this Court is **ORDERED** to forward all documents filed in this case with this
Court to the Court of Criminal Appeals.

Judgment entered August 28, 2001.


KERRY P. FITZGERALD
JUSTICE

DISMISS and Opinion Filed August 28, 2001

FILED IN
COURT OF CRIMINAL APPEALS

SEP 10 2001

Troy C. Bennett, Jr., Clerk



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-01-01294-CR

JEDIDIAH ISAAC MURPHY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F00-02424-M

MEMORANDUM OPINION

Before Justices Kinkeade, Wright, and FitzGerald
Opinion By Justice FitzGerald

A jury convicted Jedidiah Isaac Murphy of capital murder. Sentence of death was imposed. Appellant filed a notice of appeal, which was forwarded to this Court and docketed as cause no. 05-01-01294-CR. We have no jurisdiction over criminal cases in which the death penalty has been assessed. *See* TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 2001). "The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." *Id.* art. 37.071(h). Accordingly, we dismiss the appeal for want of jurisdiction.


KERRY P. FITZGERALD
JUSTICE

Do Not Publish
TEX. R. APP. P. 47